No. 17-1042	
Title:	BNSF Railway Company, Petitioner v. Michael D. Loos
Docketed:	January 25, 2018
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(15-3355, 16-1123)
Decision Date:	August 3, 2017
Rehearing Denied:	October 26, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 23 2018	Petition for a writ of certiorari filed. (Response due February 26, 2018) **Petition** **Proof of Service** **Certificate of Word Count**
Feb 06 2018	Waiver of right of respondent Michael Loos to respond filed. **Main Document**
Feb 14 2018	DISTRIBUTED for Conference of 3/2/2018.
Feb 21 2018	Response Requested. (Due March 23, 2018)
Feb 26 2018	Motion for leave to file amicus brief filed by Association of American Railroads. **Main Document** **Proof of Service**
Mar 23 2018	Brief of respondent Michael Loos in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 10 2018	Reply of petitioner BNSF Railway Company filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 11 2018	DISTRIBUTED for Conference of 4/27/2018.
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May 14 2018	Motion for leave to file amicus brief filed by Association of American Railroads

	GRANTED.
May 14 2018	Petition GRANTED.
Jun 05 2018	Motion for an extension of time to file the joint appendix and the opening briefs on the merits filed. **Main Document** **Proof of Service**
Jun 08 2018	Motion to extend the time to file the joint appendix and the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 20, 2018. The time to file respondent's brief on the merits is extended to and including September 10, 2018.
Jul 06 2018	Blanket Consent filed by Respondent, Michael Loos. **Blanket Consent**
Jul 20 2018	Brief of petitioner BNSF Railway Company filed. **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jul 20 2018	Joint appendix and supplemental volume filed. **Main Document** **Other** **Proof of Service**
Jul 27 2018	Brief amicus curiae of Association of American Railroads filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 27 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Aug 20 2018	SET FOR ARGUMENT on Tuesday, November 6, 2018
Sep 10 2018	Record requested from the U.S.C.A. 8th Circuit.
Sep 10 2018	Brief of respondent Michael Loos filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 12 2018	CIRCULATED
Sep 13 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 17 2018	Brief amicus curiae of American Association for Justice filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Sep 17 2018	Brief amici curiae of SMART and ARLA filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 20 2018	Record received from the U.S.C.A. 8th Circuit. 1 Box, the record is complete.
Oct 01 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 10 2018	Reply of petitioner BNSF Railway Company filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 30 2018	Letter of the United States filed. (Distributed). **Main Document**
Nov 06 2018	Argued. For petitioner: Lisa S. Blatt, Washington, D. C.; and Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: David C. Frederick, Washington, D. C.

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No.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding below.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. Berkshire Hathaway Inc. owns 10% or more of National Indemnity Company.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT 5

A. Railroad Retirement Statutory Scheme 5

B. The Interpretations of Federal Agencies 6

C. The Relevant Facts and Procedural History 8

D. The Opinion of the Eighth Circuit 10

E. The United States Maintains the Eighth Circuit's Decision Should Not Be Followed 12

REASONS FOR GRANTING THE PETITION 13

I. The Eighth Circuit's Opinion Deepens an Existing Conflict Over the Taxation of Lost Wages Under the RRTA 13

A. The Sixth Circuit Rules That Lost Wages Are Taxable Under the RRTA..... 13

B. The State Supreme Courts Split on the Issue 14

C. The Eighth Circuit's Decision Inserts Another Opposing View in the Midst of This Conflict 19

D. The Eighth Circuit's Interpretation Raises Serious Concerns for BNSF And the Railroad Industry..... 21

II. The Decision Below Conflicts With This Court's Precedent 24

A. The Decision Below Conflicts With This Court's FICA Precedent..... 25

B. The Decision Below Conflicts With This Court's *Chevron* Precedent..... 26

III. This Is An Ideal Vehicle To Address the Exceptionally Important Issue..... 30

CONCLUSION 33

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS OF THE EIGHTH CIRCUIT, FILED AUGUST 3, 2017 ..... 1a

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FILED DECEMBER 15, 2015 ..... 25a

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED OCTOBER 26, 2017 ..... 31a

APPENDIX D — RELEVANT STATUTORY PROVISIONS 33a

TABLE OF AUTHORITIES

Page(s)

Cases

American Hospital Ass'n v. NLRB,
499 U.S. 606 (1991) 27

Atchison, Topeka & Santa Fe Ry. v. U.S.,
628 F. Supp. 1431 (D. Kan. 1986) 29

Atlantic Land & Improvement Co. v. United States,
790 F.2d 853 (11th Cir. 1986) 27

Beech Aircraft Corp. v. Rainey,
488 U.S. 153 (1988) 27

Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Chi. Milwaukee Corp. v. U.S.,
35 Fed. Cl. 447 (1996) 29

Commissioner v. Sunnen,
333 U.S. 591 (1948) 23, 24

Erlenbaugh v. United States,
409 U.S. 239 (1972) 27

Hance v. Norfolk S. Ry. Co.,
571 F.3d 511 (6th Cir. 2009) 2, 13, 14, 20

Heckman v. Burlington N. Santa Fe Ry.,
837 N.W.2d 532 (Neb. 2013) ..... *passim*

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 27

Liberatore v. Monongahela Ry. Co.,
140 A.3d 16 (Pa. Sup. Ct. 2016) ..... *passim*

Mayo Found. for Med. Educ. & Res. v. United States,
562 U.S. 44 (2011) 26

Mickey v. BNSF Ry.,
437 S.W.3d 207 (Mo. banc 2014) ..... *passim*

Monessen Southwestern Ry. v. Morgan,
486 U.S. 330 (1988) 24

Norfolk S. Ry. Co. v. Williams,
No. 2160823 (Ala. App.) 32

Phillips v. Chicago Central & Pacific R.R.,
853 N.W.2d 636 (Iowa 2014) ..... *passim*

Soc. Sec. Bd. v. Nierotko,
327 U.S. 358 (1946) 11, 25, 26

Thor Power Tool Co. v. Commissioner,
439 U.S. 522 (1979) 4

Union Pacific R.R. Co. v. United States,
865 F.3d 1045 (8th Cir. 2017), *pet. for cert filed*, No. 17-1002 ..... 10, 11, 12

United Savings Ass'n of Texas v. Timbers of Indwood Forest Ass., Ltd., 484 U.S. 363 (1988) 27

United States v. Quality Stores, Inc., 134 S. Ct. 1395 (2014) 11, 25, 26

Wisc. Central LTD v. United States, 856 F.3d 490 (7th Cir. 2017), *cert granted*, No. 17-530, 2018 WL 386569 (Jan. 12, 2018) 32

Wisc. Central Ltd. v. United States, No. 17-530, 2018 WL 386569 (Jan. 12, 2018) 10

Statutes

26 U.S.C. § 104 ..... 9, 17, 18

26 U.S.C. § 3121(b) 25

26 U.S.C. § 3121(b)(9) 5

26 U.S.C. § 3201 5

26 U.S.C. §§ 3202(a)-(b) 4

26 U.S.C. § 3221 5

26 U.S.C. § 3231(e)(1) 27

26 U.S.C. § 3231(e) 5, 28

26 U.S.C. § 6672 4

28 U.S.C. § 1257 1

45 U.S.C. §§ 51, 56 8

45 U.S.C. § 231(h)(1) 5, 27

45 U.S.C. § 231a 5

Administrative Rulemakings and Decisions

26 C.F.R. § 31.3231(e)-1(a)(3)-(4) ..... *passim*

Employment Taxes; Applicable on or after January 1, 1955, 21 Fed. Reg. 1648, 1653-54 (Mar. 15, 1956) 6

IRS Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961) 9

IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985) 9

Republication of Regulations, 25 Fed. Reg. 13032, 13080 (Dec. 20, 1960) 6

Update of Railroad Retirement Tax Act Regulations, 59 Fed. Reg. 66188, 66187 (Dec. 23, 1994) 6, 7, 32

PETITION FOR A WRIT OF CERTIORARI

BNSF Railway Company (BNSF) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 865 F.3d 1106 and included in the Appendix ("App.") at 1a–24a. The Eighth Circuit's order denying rehearing or rehearing en banc (App. 31a-32a) is not reported. The post-trial order of the district court is unpublished and included in the Appendix at 25a–30a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Eighth Circuit entered its judgment on August 3, 2017 and denied BNSF's timely petition for rehearing or rehearing en banc on October 26, 2017.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Railroad Retirement Tax Act, the Railroad Retirement Act, and the implementing regulations are set forth in the appendix to this petition. (App. 33a-48a.)

INTRODUCTION

After plaintiff obtained a jury verdict for lost wages in connection with a workplace injury, BNSF moved to amend the judgment. BNSF asked the district court to reduce the judgment by an amount

to cover the payroll taxes that plaintiff owed to the Internal Revenue Service under the Railroad Retirement Tax Act (RRTA). The district court refused and the court of appeals affirmed, holding that the damages that plaintiff received for time lost from work do not constitute taxable compensation under the RRTA. (App. 24a.) Thus, this case presents the question whether a railroad's payments to an employee for time lost are subject to employment taxes under the RRTA.

The decision of the Eighth Circuit in this case conflicts with a prior decision of the Sixth Circuit. *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511 (6th Cir. 2009). The conflict is further sharpened by decisions of the highest courts of three states within the Eighth Circuit, which are themselves divided on the question presented in this case, with two courts agreeing with the Sixth Circuit and the third court on the side of the Eighth Circuit. *Compare Phillips v. Chicago Central & Pacific R.R.*, 853 N.W.2d 636 (Iowa 2014); *Heckman v. Burlington N. Santa Fe Ry.*, 837 N.W.2d 532 (Neb. 2013), *with Mickey v. BNSF Ry.*, 437 S.W.3d 207 (Mo. banc 2014).

The disagreement turns on the validity of an IRS regulation that interprets taxable "compensation" under the RRTA as including pay for time lost. 26 C.F.R. § 31.3231(e)-1(a) (App. 46a-47a). The Supreme Courts of Iowa and Nebraska reason that it is "unclear" from the RRTA's statutory language and structure "whether Congress intended to include time lost in the definition of [taxable] compensation." *Phillips*, 853 N.W.2d at 649. These courts find that

the IRS's interpretation is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Phillips*, 853 N.W.2d at 649-51; *Heckman*, 532 N.W.2d at 540; *see also Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29-30 (Pa. Sup. Ct. 2016).

In its decision in this case, the Eighth Circuit rejected the IRS's interpretation of the statutory language and held payments for lost time are not taxable under the RRTA. The Eighth Circuit reasoned that the "plain language" of the RRTA, limiting "compensation" to remuneration paid "for services rendered as an employee," requires actual performance of the service. (App. 20a.) The Eighth Circuit held that "the regulations providing to the contrary receive no deference under *Chevron* ...." (App. 24a.) Similarly, the Missouri Supreme Court acknowledged the contrary rulings of the Iowa and Nebraska Supreme Courts relying on *Chevron* but found them "unpersuasive." *Mickey*, 437 S.W.3d at 212-16 & n.10.

This conflict creates an untenable situation. Railroads and their employees face different tax liability depending upon where the lawsuit is filed. For example, an employee injured in Iowa can avoid paying RRTA taxes on lost wages – and thereby take home more money – simply by filing his negligence suit in Iowa federal court rather than Iowa state court. This is a particular problem for BNSF, which has operations and employees in 28 states including Iowa, Nebraska, and Missouri. This Court has long recognized that the Nation's tax laws are to be

interpreted and applied to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979).

In view of the conflict in the courts, BNSF seeks definitive guidance from this Court on the validity of the IRS's interpretation that the pay for time lost is subject to employment taxes under the RRTA. Under the RRTA, the railroad employer must withhold its tax share, as well as its employee's tax share, and then pay over both shares to the IRS. 26 U.S.C. §§ 3202(a)-(b). Failure to withhold the taxes is a serious offense under federal law, subjecting the railroad to fines and potential criminal liability. *See* 26 U.S.C. § 6672. BNSF is required under the IRS regulation to pay the RRTA taxes for time lost, and it followed that regulation here. The United States participated as amicus curiae in this case to support its regulation. (App. 2a, 21a, 23a.)

This issue arises in every case in which a rail employee makes a claim for lost wages against his railroad employer. It therefore affects thousands of railroad workers and every freight railroad in the United States. There are over 152,000 Class 1 railroad employees in this country, and over 4000 railroad employee on-the-job incidents each year. With the state and federal courts in sharp disagreement, the time is ripe for this Court to intervene and achieve a uniform interpretation of this federal statute.

STATEMENT

A. Railroad Retirement Statutory Scheme

Railroad employees do not participate in Social Security and are exempt from the Federal Insurance Contributions Act (FICA). *See* 26 U.S.C. § 3121(b)(9). Since the 1930s, the railroad employees have participated in a separate retirement and disability benefit system. The federal legislation to manage this system consists of two "closely related" statutes: the Railroad Retirement Act (RRA), which establishes the benefits, and the Railroad Retirement Tax Act (RRTA), which sets the taxes to fund those benefits. (App. 18a.)

Under these closely related statutes, the benefits and taxes are predicated on the employee's "compensation." *See* 26 U.S.C. § 3201 (employee rate of tax); 26 U.S.C. § 3221 (employer rate of tax); 45 U.S.C. § 231a (eligibility for annuities). The RRTA – which imposes taxes to fund the benefits – defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e) (App. 33a).

The RRA – which establishes the benefits – defines "compensation" as any form of "monetary remuneration paid to an individual for services rendered as an employee to one or more employers ... including remuneration paid for time lost as an employee ...." 45 U.S.C. § 231(h)(1) (App. 41a). This definition makes clear that pay "for services

rendered" is broad enough to encompass pay for time lost.

B. The Interpretations of Federal Agencies

The IRS administers the RRTA and, since 1956, has defined taxable compensation to include pay for time lost.[1] The IRS regulation provides that the "term compensation is not confined to amounts paid for active services, but includes amount paid for an identifiable period during which the employee is absent from the active service of the employer . . . as well as pay for time lost." 26 C.F.R. § 31.3231(e)-1(a)(3)-(4) (App. 46a-47a).[2]

The IRS reaffirmed this interpretation in a 1994 rulemaking. *Update of Railroad Retirement Tax Act Regulations*, 59 Fed. Reg. 66188, 66187 (Dec. 23, 1994). In that rulemaking, one commenter stated that statutory amendments had eliminated payments for "time lost" from the RRTA's definition of taxable compensation and thus this regulation was

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[1] *Employment Taxes: Applicable on or after January 1, 1955*, 21 Fed. Reg. 1648, 1653-54 (Mar. 15, 1956) (Proposed Rulemaking); *Employment Taxes: Applicable on or after January 1, 1955*, 1956 WL 58917 (Sept. 4, 1956) (final rulemaking); *Republication of Regulations*, 25 Fed. Reg. 13032, 13080 (Dec. 20, 1960).

[2] The IRS's regulations also state that the "term compensation has the same meaning as the term wages in [FICA] ... except as specifically limited by the Railroad Retirement Tax Act ... or regulation." 26 C.F.R. § 31.3231(e)-1(a) (App. 46a).

no longer supported by the statute. *Id.* The IRS explained that the statutory amendments only affected when, not whether, time-lost payments were included in compensation. *See id.* Thus, the IRS maintained that the statutory amendments did not exclude time-lost payments from the definition of "compensation."

The Railroad Retirement Board administers the benefits program under the RRTA. The Board counts payments for time lost toward the employees' creditable service and agrees with the IRS that the definition of taxable compensation under the RRTA should be construed similarly. (App. 18a.) As the Board explained, "[t]he Office has long recognized that in view of the substantial similarity between the definitions of compensation under the RRA and RRTA, it is desirable, absent controlling language to the contrary to treat payments to employees in the same fashion under both statutes."[3] Thus, the Railroad Retirement Board maintains that "[a]s with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act ...."[4]

This interpretation treats benefits and taxes symmetrically. Pay for time lost is counted toward creditable service under the RRA and affects the level of benefits that the employee receives when he

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[3] U.S. Railroad Retirement Board Legal Opinion L-2005-25 at 2 (Dec. 2, 2005).

[4] U.S. Railroad Retirement Board, *Railroad Retirement Service Credits and Pay for Time Lost* at 1, 3 (May 2011).

or she retires. (App. 18a.) And both the employee and employer pay taxes on pay for time lost under the RRTA to fund those benefits. (App. 19a.)

C. The Relevant Facts and Procedural History

The facts are not in dispute. In 2013, plaintiff sued BNSF under the Federal Employers' Liability Act (FELA) to recover damages for work-related injuries. The FELA provides for concurrent jurisdiction in state and federal court. 45 U.S.C. §§ 51, 56. Plaintiff filed this action in Minnesota federal district court. Following a trial, the jury returned a verdict in favor of plaintiff in the amount of $126,212.78. (App. 7a.) The verdict included a line itemization of $30,000 in lost wages. (App. 7a, 26a.) The district court entered the entire amount in judgment against BNSF. (App. 26a.)

BNSF filed a timely motion to amend or alter the judgment under Federal Rule of Civil Procedure 59(e). (App. 7a.) BNSF notified the court that it had paid to the IRS a total of $9990 in RRTA taxes, which consisted of the $3765 owed in payroll taxes by plaintiff and the $6234 owed in payroll taxes by BNSF for the lost wage payment. (App. 29a; Dist. Ct. ECF No. 162.) As BNSF explained, plaintiff had received credit towards the amount of his retirement benefits for this time-lost payment. (*Id.*) Consequently, BNSF asked the district court to offset the judgment by $3765 to reflect plaintiff's share of taxes owed under the RRTA as a result of the lost wage award. (App. 29a.)

The district court agreed with BNSF that "FELA judgments for lost pay fall within the definition of 'compensation'" under the RRTA. (App. 29a.) However, the district court observed that personal injury awards are exempt from income taxes under 26 U.S.C. § 104. (App. 30a.) The court believed that this exemption for personal injury judgments should apply to the RRTA's definition of compensation as well. (App. 30a.) Accordingly, the court denied BNSF's motion for an offset.

BNSF appealed, and the United States filed an amicus brief in support. Their briefs explained that the RRTA tax is imposed on "compensation" – a defined term in the RRTA – and that the IRS has interpreted this term to include pay for time lost. The district court was wrong to invoke Section 104, which is an exemption applicable to a different statutory term (gross income) for a different tax (income tax). The IRS has concluded in two Revenue Rulings that Section 104 has no bearing on the RRTA tax treatment for time lost.[5] Finally, the briefs pointed to the decisions from the Iowa Supreme Court and Nebraska Supreme Court, as well as a recent decision of the Pennsylvania intermediate appellate court, as holding that lost wages are taxable compensation under the RRTA.

The Eighth Circuit panel heard oral argument in this case and another RRTA case on the same day.

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[5] *See* Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961); IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985).

The other case raised two questions: (1) whether non-qualified stock options are taxable compensation under the RRTA, and (2) whether lump-sum payments to unionized employees were "for services rendered" by the employee. The Eighth Circuit panel ruled against the IRS on both issues. *Union Pacific R.R. Co. v. United States*, 865 F.3d 1045 (8th Cir. 2017), *pet. for cert filed*, No. 17-1002.[6] The same panel issued its published decision in this case three days later.

D. The Opinion of the Eighth Circuit

The Eighth Circuit affirmed the district court's decision in this case, though on different grounds. (App. 24a.) The court recognized that "damages for lost wages fit well within the definition of 'compensation'" under the IRS regulation, but it rejected this interpretation of the RRTA. (App. 19a-20a.) "[T]he RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" (App. 24a.)

The Eighth Circuit reasoned that the RRTA defines "compensation" as remuneration paid "for

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[6] On January 12, 2018, this Court granted certiorari to resolve the split between the Eighth, Seventh, and Fifth Circuits on whether non-qualified stock options are taxable compensation under the RRTA. *See Wisc. Central Ltd. v. United States*, No. 17-530, 2018 WL 386569 (Jan. 12, 2018). On January 18, 2018, the United States filed a petition for certiorari from the Eighth Circuit's opinion in *Union Pacific* and asked this Court to hold the petition in abeyance pending the Court's decision in *Wisconsin Central*.

services rendered as an employee." (App. 20a.) The panel construed "services rendered" to mean "services that that an employee actually renders, not to services that the employee would have rendered but could not." (App. 20a.) The panel acknowledged that this Court has construed, in the FICA context, the concept of payment for services performed to encompass the entire employee-employer relationship. (App. 19a-20a.)[7] However, citing to its recent opinion in *Union Pacific*, the panel found this FICA precedent was not applicable to the RRTA and thus gave it no weight. (App. 20a.) The panel concluded that "damages for lost wages do not fit within the plain meaning of the RRTA" and that the IRS "regulations providing to the contrary receive no deference under *Chevron* ...." (App. 20a, 24a.)

The Eighth Circuit acknowledged that the RRA defines compensation to include pay for time lost. "[B]ecause the RRA expressly considers pay for time lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits." (App. 21a.) The court, however, observed that these statutes contained "linguistic" differences: "That Congress expressly included pay for time lost in the RRA's definition of 'compensation' yet omitted it from the RRTA's definition suggests that Congress did not intend the RRTA to include pay for time lost." (App. 21a.) According to the court, the statutory

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[7] *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365–66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014).

history "confirms" that the linguistic differences are "intentional." (App. 21a.) Thus, the Eighth Circuit ruled that the lost-wages award was not subject to payroll taxes under the RRTA. (App. 23a-24a.)

BNSF filed a timely petition for rehearing and rehearing en banc. BNSF explained that the panel's ruling conflicted with decisions of other state and federal courts, which had found the statutory language and history ambiguous. The Eighth Circuit denied rehearing on October 26, 2017.

E. The United States Maintains the Eighth Circuit's Decision Should Not Be Followed

After the Eighth Circuit issued its decision, the turmoil over the scope of the RRTA taxes continued. On November 21, 2017, the United States filed an amicus brief in the Illinois intermediate appellate court in a case raising the same time-lost issues. *See Munoz v. Norfolk S. Ry. Co.*, No. 1-17-1009 (Ill. App.). In its brief, the United States argued the Eighth Circuit's decision in *Loos* is "seriously flawed" and "should not be followed." U.S. Amicus Br. 13, *available at* 2017 WL 6885570.

The United States explained that the court's opinion was contrary to this Court's precedent. According to the United States, the Eighth Circuit's narrow interpretation of what is taxable compensation under the RRTA – and specifically, the phrase "for services rendered" – is "in substantial tension with the Supreme Court's holdings in the analogous Social Security context that back pay and severance pay constitute taxable wages." (*Id.* at 14.) The United States further criticized the Eighth Circuit's simplistic review of the statutory

amendments and refusal to defer to the agency's interpretation of those amendments, contrary to *Chevron*. As the United States explained, "a careful analysis" of those amendments, including the legislative history, "shows that the statute was amended for reasons unrelated to pay for time lost" and that Congress did not intend to exclude time-lost payments from RRTA taxes. (*Id.*)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the federal and state courts are in conflict on the issue of whether awards for lost pay are subject to RRTA taxes. This conflict is sharpest in the Eighth Circuit, where the federal and state supreme courts are themselves divided, with the Eighth Circuit and Missouri Supreme Court on one side and the Supreme Courts of Iowa and Nebraska on the other. As a result of this conflict, the railroad and its employees face conflicting rules on RRTA tax liability depending on the forum. Only this Court can resolve this conflict and ensure that similarly situated taxpayers pay the same amounts.

I. The Eighth Circuit's Opinion Deepens an Existing Conflict Over the Taxation of Lost Wages Under the RRTA

A. The Sixth Circuit Rules That Lost Wages Are Taxable Under the RRTA

The Sixth Circuit was the first appellate court to address the issue of whether pay for time lost is taxable under the RRTA. *See Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511 (6th Cir. 2009). The court held

that the RRTA imposes payroll taxes on a jury's award of backpay to a railroad employee. *Id.* at 523.

In *Hance*, a former employee obtained a favorable verdict against the railroad for discrimination and obtained an award of damages including for backpay. *Id.* at 515, 517. On appeal, the railroad argued that the damages should be reduced by the employee's share of RRTA taxes because this is not money he would take home and thereby goes beyond what is needed to make the plaintiff whole. *Id.* at 522. The Sixth Circuit agreed. "The Railroad Retirement Tax Act and its accompanying regulations ... require an employer to pay ... taxes on all 'compensation' to employees, including payment for time lost." *Id.* at 523 (internal quotations and citation omitted). The railroad "will be required to report and pay ... taxes on the back pay award ...." *Id.* at 523. Thus, the Sixth Circuit vacated the district court's award and directed the district court to enter an order acknowledging that the railroad must "comply with its obligations to pay" the employer and employee taxes on the backpay award. *Id.*

B. The State Supreme Courts Split on the Issue

Because FELA cases can be brought in either state or federal court, the question of whether pay for time lost constitutes taxable compensation under the RRTA also arose in the state courts. The Missouri Supreme Court split with the Iowa and Nebraska Supreme Courts on whether lost-wages awarded as part of a FELA judgment are subject to RRTA taxes. The United States participated as amicus curiae in all of these appeals.

When faced with the issue in 2013, the Supreme Court of Nebraska recognized that "we apply federal law to determine if the time lost was compensation subject to withholding under the RRTA." *Heckman v. Burlington N. Santa Fe Ry. Co.*, 837 N.W.2d 532, 540 (Neb. 2013). After reviewing the relevant statutes and regulations, the court concluded that the lost-wages award in the FELA judgment is taxable compensation under the RRTA. "Based on the definition of compensation as stated in the RRA and RRTA and the agencies' interpretations as found in federal regulations, we conclude that time lost is compensation that is subject to taxation." *Id.* The court reasoned that the RRA defines compensation to include payments for time lost and that the IRS had interpreted compensation under the RRTA to include "pay for time lost." *Id.* at 539-40 (citing Treas. Reg. § 31.3231(e)-1(a)(4)). "Time lost is equated with lost wages." *Id.* at 540.

One year later, the Supreme Court of Iowa took a more detailed look at the issue and reached the same conclusion. *Phillips v. Chicago Central & Pacific R.R. Co.*, 853 N.W.2d 636, 652 (Iowa. 2014). The court recognized that this "is a question of federal law" and that "this case is properly analyzed under *Chevron*." *Id.* at 648. On *Chevron* step 1, the court started with the statutory language and found that the RRTA "does not explicitly address the tax consequences of remuneration for time lost ...." *Id.* at 640. The court acknowledged that "time lost" used to appear in the RRTA's definition of compensation and that this language was removed in 1975. "This

deletion, however, does not compel an assumption that Congress intended the definition of compensation to exclude time lost in the RRTA." *Id.* at 648.

The Iowa Supreme Court looked to the definition of compensation as defined in the companion statute – the RRA. "The RRA and the RRTA are inextricably interconnected because the latter funds the former," and thus the "RRA is part of the context and statutory scheme which courts look to in analyzing congressional intent." *Id.* at 650. Because the RRA includes time for pay for time lost in its definition of compensation, "[i]t would seem logical to read these two statutes in harmony to conclude that compensation as used in the RRTA implicitly includes time lost." *Id.* at 649. The court also looked to the legislative history of the statutory amendments to the RRTA. The court found that "the legislative history appears to conclude that amendments, which removed the 'time lost' language from the RRTA, did not intend to remove the phrase from the meaning of compensation, although the legislative history is generally unhelpful in clarifying Congress's intent on this precise issue." *Id.* at 650; *see also id.* at 640 & nn.1-3. After "considering the statutory language, the statutory scheme, and the legislative history of the definition of compensation as used in the RRTA," the Iowa Supreme Court found "congressional intent ambiguous." *Id.* at 650.

The Iowa Supreme Court then turned to step two in *Chevron*'s analysis. 853 N.W.2d at 650. The court noted that the IRS "was aware of the removal of the

phrase 'time lost' from the definition of compensation from the statute and, after analyzing the legislative history, determined that Congress did not intend to 'exclude payments for time lost from compensation.'" *Id.* The court also relied on compatible interpretations of the federal agencies construing the RRTA and RRA. *See id.* at 651. "[W]e conclude that the definition of compensation to include time lost as interpreted by the Treasury Department ... is reasonable, and thus, time lost is properly taxed as compensation under the RRTA." *Id.* at 652.

Two weeks later, the Supreme Court of Missouri split with the Supreme Courts of Iowa and Nebraska. *See Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207 (Mo. banc 2014). The Missouri Supreme Court recognized that "*Phillips* holds that the RRTA's definition of compensation includes lost wages and that lost wages received on account of a FELA personal injury claim are subject to withholding taxes under the RRTA." *Id.* at 212. However, "[t]his Court finds *Phillips* unpersuasive." *Id.* at 213. The court also criticized the *Heckman* decision, saying the Nebraska Supreme Court committed "error" in failing to differentiate between the RRA and RRTA. *Id.* at 215 n.10.

The *Mickey* court insisted that "[t]here are many reasons why the term 'compensation' has a different meaning under the RRTA than it has under the RRA." *Id.* at 213. The *Mickey* court relied heavily upon the exclusion from federal income taxes for personal injury awards, 26 U.S.C. § 104(a)(2). *See id.* Although Section 104's exclusion applies to a

different tax – federal income taxes – the Missouri court reasoned that the same exclusion should apply to RRTA taxes. *Id.*; *see id.* at 210-12.[8]

The *Mickey* court also emphasized that "the RRA is a remedial act that provides benefits to railroad workers" and calculating the benefits to include time-lost payments "advances the RRA's remedial purpose." *Id.* at 215. The court concluded: "No credible reason is given by the parties to this suit or the Iowa Supreme Court's opinion in *Phillips* why this Court should incorporate a definition of compensation from the RRA into the interpretation of the RRTA in order to determine whether withholding taxes are due on personal injury awards." *Id.*

Mickey did not resolve the issue in the courts. In 2016, the Pennsylvania appellate court ruled that an award for lost time due to personal injury is taxable under the RRTA. *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 25-30 (Pa. Super. Ct. 2016). In its analysis, the court sided with the Supreme Courts of Iowa and Nebraska and against the Supreme Court

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[8] In a recent amicus brief filed in the Illinois appellate court, the United States has explained the critical flaw in the *Mickey* court's reliance on the personal injury exclusion in Section 104(a)(2): "I.R.C. 104(a)(2) provides an *income* tax exclusion but income tax and RRTA tax are entirely different types of taxes." U.S. Amicus Br. 22, *available at* 2017 WL 6885570. "The scope of what is taxable under the income tax and the RRTA is different ..., and an exclusion from income tax does not dictate an exclusion from RRTA tax ...." *Id.*

of Missouri on this issue. "Although the *Mickey* court attempted to disassociate the RRA and RRTA, we find the statutes are inextricably intertwined, and must be considered in *pari materia*." *Id.* at 29. "Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under the RRTA to pay for those benefits." *Id.*

The Pennsylvania court also criticized the *Mickey* court's reliance on the FICA's definition of wages. "[W]hat the *Mickey* Court, and the trial court herein, failed to consider, is the difference in the way in which the RRA and the Social Security Act (SSA) treat lost wages awarded in a personal injury suit." *Id.* at 29. The Pennsylvania court explained that the SSA does not calculate benefits based on an employee's pay for lost time due to personal injury and thus "it follows that . . . FICA also does not tax an award for time lost due to personal injury." *Id.* at 30. By contrast, under the RRTA the railroad employee receives an increase in benefits based upon pay for time lost and thus "it follows that the same 'time lost' award should be taxed under the RRTA to pay for those benefits." *Id.* at 29. Thus, the *Liberatore* decision deepened the conflict in the state courts, which alone would have warranted *certiorari*.

C. The Eighth Circuit's Decision Inserts Another Opposing View in the Midst of This Conflict

One year following *Liberatore*, the Eighth Circuit published its decision in this case, deepening the conflict. The Eighth Circuit acknowledges that "because the RRTA expressly considers pay for time

lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits." (App. 21a.) However, the court did not reach that outcome. It held "that the RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" (App. 24a.)

This holding conflicts with the Sixth Circuit, which held: "The Railroad Retirement Tax Act and its accompanying regulations ... require an employer to pay ... taxes on all 'compensation' to employees, including payment for time lost." *Hance*, 571 F.3d at 523.

It also directly conflicts with the holdings of the Iowa and Nebraska Supreme Courts. *See Phillips*, 853 N.W.2d at 652 ("[W]e conclude that the definition of compensation to include time lost as interpreted by the Treasury Department ... is reasonable, and thus, time lost is properly taxed as compensation under the RRTA."); *Heckman*, 837 N.W.2d at 540 ("Based on the definition of compensation as stated in the RRA and RRTA and the agencies' interpretations as found in federal regulations, we conclude that time lost is compensation that is subject to taxation."). *See also Liberatore*, 140 A.3d at 30 ("Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under RRTA to pay for those benefits.").

The Eighth Circuit's ruling also conflicts with the IRS regulation providing that pay for time lost is part of "compensation" subject to the payroll tax. 26 C.F.R. §§ 31.3231(e)-1(a)(3)-(4). While the other courts had followed the IRS interpretation, the Eighth Circuit held that the IRS regulations "receive no deference under *Chevron* ...." (App. 24a.) The Eighth Circuit thought itself constrained by the statutory language to reach a result that did not make sense and that ultimately could lead to the underfunding of benefits. (App. 20a-24a.)

D. The Eighth Circuit's Interpretation Raises Serious Concerns for BNSF and the Railroad Industry

This multi-faceted conflict creates a particular problem for BNSF, which is an interstate freight railroad and has employees in Missouri, Nebraska, and Iowa, as well as 25 other states.

There is no uniform rule of law. Under the current state of affairs, employees receive highly variable tax treatment of their FELA awards depending upon where they file suit. While BNSF will withhold RRTA taxes from judgments for lost damages issued in Iowa or Nebraska state court, it is not authorized to withhold RRTA taxes from judgments issued in federal court or Missouri state court. Thus, railroad employees in district courts within the Eighth Circuit and Missouri state court will bring home more money than similarly-situated employees in Nebraska or Iowa state court.

The issue is even more complicated in those situations where the employee has not filed suit in any court but makes a claim for time lost due to a workplace injury. The parties may want to negotiate a settlement that includes pay for time lost, without any litigation. Because the forum is not known and there is a split in the federal and state courts on the issue, the RRTA tax obligations on the settlement are uncertain.

This question has far-reaching implications for the Class 1 railroads and their 152,000 employees.[9] There are over 4000 on-the-job incidents each year,[10] with total FELA payments in the hundreds of millions of dollars. In light of the significant tax implications, it should come as no surprise that the litigation over this issue has exploded over the last few years. The issue has reached different appellate courts almost every year – the Nebraska Supreme Court in 2013, the Supreme Courts of Iowa and Missouri in 2014, the Pennsylvania appellate court in 2016, and the Eighth Circuit in 2017. The issue is currently pending in other appellate courts including Illinois and Alabama. With multiple years of litigation producing a split in the federal and state courts, the time is ripe for the Court to intervene.

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[9] *See* Class 1 Railroad Statistics, published by the Association of American Railroads (May 1, 2017), *available at* https://www.aar.org/Documents/Railroad-Statistics.pdf.

[10] *See* Federal Railroad Administration, Ten Year Accident/Incident Overview, http://safetydata.fra.dot.gov/officeofsafety/publicsite/query/TenYearAccidentIncidentOverview.aspx.

The implications of the Eighth Circuit's decision extend well beyond the employee's share of taxes on time-lost in FELA awards. The Eighth Circuit interpreted "compensation" under the RRTA as limited to pay for services "an employee actually renders ...." (App. 20a.) As the United States has indicated, this interpretation puts into question RRTA taxes on other forms of compensation that do not relate to actual services rendered – i.e., vacation pay, sick pay, or severance pay – which have historically been taxed by the IRS.[11] Under the Eighth Circuit's opinion, the Class 1 railroads and their 152,000 employees would not be required to pay RRTA taxes on those forms of payment. And the railroads and their employees would be entitled to a refund for prior payments withheld and paid to the IRS pursuant to the IRS's interpretation.

This Court has long stressed the importance of a nationally uniform tax system. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). When one taxpayer "is accorded a tax treatment different from that given to other taxpayers of the same class," the result is "inequalities in the administration of the revenue laws, discriminatory distinctions in tax

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[11] *See* U.S. Amicus Br. 12, available at *available at* 2017 WL 6885570 (arguing that the Eighth Circuit's limited interpretation of taxable compensation leads to "the absurd result that numerous standard forms of compensation, such as sick pay and vacation pay, would no longer qualify as 'compensation" under the RRTA").

liability, and a fertile basis for litigious confusion." *Id.*

The differences in the federal taxes applicable to FELA awards are particularly objectionable. This Court has repeatedly held that the FELA was designed to create a nationally uniform remedy for railroad employees. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335 (1988). In particular, there was to be equal treatment of FELA cases brought in state court as compared to those brought in federal court. The Eighth Circuit's decision guarantees that railroad workers will be treated differently in federal court.

II. The Decision Below Conflicts With This Court's Precedent

The Eighth Circuit relied on two aspects of the statutory definition of "compensation" to reach what it called the "plain meaning" of the statute. First, the court interpreted the phrase "for services rendered" as requiring actual performance of services. (App. 20a.) Then, the court looked to the "history" of the RRTA, from which the Court inferred a congressional intent to exclude time-lost payments from RRTA taxes. (App. 21-22a.) The United States has maintained that for both rationales, the Eighth Circuit's opinion is wrong and in tension with this Court's precedent. These methodological errors underlying the Eighth Circuit's decision, as pointed out by the United States, are themselves grounds for consideration in this Court.

A. The Decision Below Conflicts With This Court's FICA Precedent

The Eighth Circuit found that pay for time lost could not qualify as "compensation" because it was inherently inconsistent with that part of the definition that described compensation as remuneration for "services rendered." (App. 20a.) In the Eighth Circuit's view, the "plain language" of compensation is limited to pay for services "actually rendered." (App. 20a.)

As the United States has observed, the Eighth Circuit's "ruling is in conflict with the Supreme Court's holdings in the analogous Social Security context that back pay and severance pay constitute taxable wages." U.S. Amicus Br. 14, *available at* 2017 WL 6885570. In cases interpreting FICA, this Court has interpreted pay for services broadly: "We think that 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365–66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014) (relying on *Neirotko* to deem severance payments "wages" under the FICA).

The Eighth Circuit stated that the FICA precedent could not be relied upon because FICA taxes payment for "employment," while the RRTA taxes payment for "services." (App. 20a.) But FICA defines "employment" to mean "any service ... performed ...." 26 U.S.C. § 3121(b) ("the term 'employment' means any service, of whatever nature,

performed ...."). Thus, the critical point is not any difference in the use of the words "employment" and "services" but in the *underlying* similarity – both terms turn on the concept of service performed. This Court was satisfied that Congress could have intended that concept to encompass the whole relationship, not an individual part of it. *Nierotoko*, 327 U.S. at 365-66. *Nierotko* and *Quality Stores* demonstrate that it is possible to construe pay for time lost, like vacation pay, as part of the package of benefits that an employee receives for services rendered. Thus, the Eighth Circuit reached a conclusion that is inconsistent with this Court's precedent.

B. The Decision Below Conflicts With This Court's *Chevron* Precedent

The Eighth Circuit's narrow construction of the RRTA also conflicts with this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That decision prescribes a familiar two-step analysis for review of an agency regulation: (1) determine whether "Congress has directly spoken to the precise question at issue" by "employing traditional tools of statutory construction" and (2) if the relevant statute is found to be ambiguous, determine whether the agency's interpretation of the statute is reasonable. *See id.* at 842. *See also Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 53 (2011).

Subsequent decisions of this Court have illustrated the meaning of "traditional tools of statutory construction." They include the language,

statutory structure, and legislative history of the statute. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-49 (1987); *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 613 (1991); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). "[S]tatutes addressing the same subject matter generally should be read 'as if they were one law ....'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); *see also United Savings Ass'n of Texas v. Timbers of Indwood Forest Ass., Ltd.*, 484 U.S. 363 (1988) ("Statutory interpretation ... is a holistic endeavor."). This holistic approach is especially appropriate here, where the two statutes represent different sides of the same coin. *See Standard Office Bldg.*, 819 F.2d at 1373 (RRA represents "the expenditure system of the coin," and the RRTA "is the revenue side"); *Atlantic Land & Improvement Co. v. United States*, 790 F.2d 853, 856 & n.5 (11th Cir. 1986) (Because these "statutes are interrelated parts of an overall plan designed to benefit railroad employees," the "definitions should be construed and applied identically.").

Here, the meaning of "compensation" in the RRTA is clarified by the more detailed definition of that term in the related statute, the RRA. Both the RRTA and RRA define "compensation" to mean "any form of money remuneration paid to an individual for services rendered as an employee ...." 45 U.S.C. § 231(h)(1) (App. 41); 26 U.S.C. § 3231(e)(1) (App. 33a.) The RRA's definition of "compensation" then proceeds to identify explicitly some of the types of payments that are covered by this term – "including remuneration paid for time lost as an employee ...."

45 U.S.C. § 231(h)(1) (App. 41.) Thus, the RRA definition illuminates the meaning of this term as used in the RRTA. It confirms that the phrase "services rendered" is broad enough to encompass pay for time lost. This guidance is particularly valuable because the RRA and RRTA address the same program and should be read *pari materia*. *See* App. 21a. As the Iowa Supreme Court explained, "[t]he RRA and the RRTA are inextricably interconnected because the latter funds the former." *Phillips*, 853 N.W.2d at 649; *see also* U.S. Amicus Br. at 20, *available at* 2017 WL 6885570 ("We submit that this reasoning [of the Eighth Circuit] is wrong, as the two statutes clearly are related.").

Even focusing on only the RRTA's definition of compensation, the Eighth Circuit's reading rests on an impermissible parsing of the text. According to the court, "plain language of the RRTA refers to services that an employee *actually* renders, not to services that the employee would have rendered but could not." (App. 20a) (emphasis added.) The Eighth Circuit's interpretation rests on a word – "actually" – that does not appear in the statute and that is being imported into the statute by the court.

Indeed, if Congress intended to exclude time-lost payments from the definition of "compensation," it could have expressly done so. The RRTA itemizes several exclusions from the term compensation, but not one for time-lost payments. 26 U.S.C. § 3231(e) (App. 33a-40a). That omission casts serious doubt on any interpretation that Congress intended to exclude

these payments. The statutory language is at best ambiguous.

With little support for its position in the current statute, the Eighth Circuit relied upon what it viewed as the statutory "history" – the statutory amendments in 1975 and 1983. However, its history was incomplete. The court failed to take into account the legislative history of these amendments, which illuminates the reasons for those changes. The United States points out that other courts have studied the 1975 amendment to the RRTA and found that it accomplished an administrative change only. *See* U.S. Amicus Br. 13-19, *available at* 2017 WL 6885570. "Nothing in the legislative history indicates that Congress intended to change the substantive definition of 'compensation.'" *Chi. Milwaukee Corp. v. U.S.*, 35 Fed. Cl. 447, 455 & n.6 (1996). As the United States explains, the legislative history of the 1975 amendment reveals that the effect of this change was to overrule an IRS Revenue Ruling and "to clarify that compensation would ordinarily be taxed on an 'as paid' basis rather than as attributed unless the employee requested otherwise." U.S. Amicus Br. 16, *available at* 2017 WL 6885570. Its purpose was to change the timing rules for when (not whether) to assess payroll taxes. *See id.*; *see also Phillips*, 853 N.W.2d at 641 n.2, 646-47, 649-50; *Atchison, Topeka & Santa Fe Ry. v. U.S.*, 628 F. Supp. 1431, 1435-38 (D. Kan. 1986).

The Eighth Circuit panel also mentioned the 1983 amendment to the RRTA's definition of compensation. (App. 23a.) As the United States has

explained, this technical amendment was necessary to shift the definition of compensation from a monthly wage base to an annualized wage base. *See* U.S. Amicus Br. 17-18 (available at 2017 WL 6885570), citing H. Rep. No. 98-30, 98th Cong., 1st Sess. p. 21 (1983). "There was no discussion anywhere in the legislative history indicating that Congress no longer intended to treat pay for time lost as compensation." *Id.* In fact, "it would have been anomalous for Congress, in enacting legislation designed to shore up the financial stability of the railroad retirement system, to continue to treat payment for time lost as compensation for RRA benefits while at the same time exempting it from RRTA taxation." *Id.*

Because Congress has not "directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842), the Eighth Circuit should have deferred to the Treasury regulation. Instead, the Eighth Circuit reached a result that is in conflict with other courts, with the IRS regulation, and with a sensible approach to funding.

III. This Is An Ideal Vehicle To Address the Exceptionally Important Issue

This case is a particularly well-suited vehicle for resolving the entrenched split.

First, the factual predicate is clear: there is no question that a portion of plaintiff's FELA judgment consisted of pay for lost time. The verdict form in this case contained a separate line for lost pay, and the jury awarded a specific amount. (App. 26a.)

This case is unlike others in which courts have struggled with general verdicts that did not specifically indicate whether the award covered pay for lost time.[12] The use of the special verdict in this case permits the Court to focus on the interpretation of the RRTA without the distraction of interpreting a general verdict.

Second, the legal predicate is clear. The IRS regulation defining "compensation" for purposes of the RRTA explains: "The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer ...." 26 C.F.R. §31.3231(e)-1(a)(3) (App. 46a-47a). The regulation then states: "Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation *as well as pay for time lost.*" 26 C.F.R. §31.3231(e)-1(a)(4) (App. 47a) (emphasis added). Thus, if the regulation is permissible under *Chevron*, there is no doubt that it requires taxation. (App. 19a.)

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[12] *See, e.g., Mickey*, 437 S.W.3d at 208, 216 ("judgment is based on a general verdict that does not state that any part of the award is for lost wages"); *Heckman*, 837 N.W.2d at 537-538 (general verdict presumed under state law to be based at least in part on lost wages); *Phillips*, 853 N.W.2d at 643-45 (same); *Liberatore*, 140 A.3d at 30-32 (same).

Third, the responsible federal agency has taken a firm position. The IRS has not only promulgated the regulation, but reconsidered it in light of the evolution of the statute and insisted on its validity. *Update of Railroad Retirement Tax Act Regulations*, 59 Fed. Reg. 66188, 66187 (Dec. 23, 1994). The United States has defended the IRS's regulation in six amicus briefs filed in courts around the country.[13] The agency's position is consistent, vigorous, and well-known.

Finally, this case raises an issue distinct from *Wisc. Central LTD v. United States*, 856 F.3d 490 (7th Cir. 2017), *cert granted*, No. 17-530, 2018 WL 386569 (Jan. 12, 2018). In that case, a railroad challenges the Seventh Circuit's holding that nonqualified stock options constitute compensation subject to tax under the RRTA. While the case involves the same statutory provision as this one, it

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[13] The six amicus briefs are: (1) Brief of United States as Amicus Curiae in support of Appellant, *Munoz v. Norfolk Southern Ry. Co.* (Illinois App.), *available at* 2017 WL 6885570; (2) Brief of Amicus Curiae United States of America (Pa. Super.), *available at* 2015 WL 10489910; (3) Brief of United States as Amicus Curiae in support of Appellee and in support of Affirmance, *Phillips v. Chicago, Central & Pacific R.R. Co.* (Iowa), *available at* 2013 WL 11262292; (4) Brief of United States as Amicus Curiae in support of Appellant and in support of Reversal, *Mickey v. BNSF Ry. Co.*, (Missouri), *available at* 2013 WL 210157; (5) Brief of United States as Amicus Curiae in support of Appellant and in support of Reversal, *Heckman v. Burlington Northern Santa Fe R.R. Co.*, (Nebraska), *available at* 2013 WL 1809429; (6) Brief of United States, *Norfolk S. Ry. Co. v. Williams*, No. 2160823 (Alabama App.)

turns on a different phrase – money remuneration – and implicates different questions of interpretation. This case should be heard on its own merits. It should not be held for *Wisconsin Central*.

In the absence of a decision by this Court resolving the conflict, the question of whether railroads should withhold RRTA taxes on time-lost payments will continue to foment recurring and wasteful litigation. Disparate treatment of otherwise identically situated taxpayers will continue and the applicable rule will depend upon the court forum. Resolution of this recurring question by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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January 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT, FILED AUGUST 3, 2017

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 15-3355, No. 16-1123

MICHAEL D. LOOS,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellee,

AMERICAN ASSOCIATION FOR JUSTICE,
AMICUS ON BEHALF OF APPELLANT(S)

MICHAEL D. LOOS,

Plaintiff-Appellee.

v.

BNSF RAILWAY COMPANY,

Defendant-Appellant.

Appendix A

UNITED STATES OF AMERICA, AMICUS ON BEHALF OF APPELLANT(S) AMERICAN ASSOCIATION FOR JUSTICE, AMICUS ON BEHALF OF APPELLEE(S)

Submitted: June 6, 2017
Filed: August 3, 2017

Before WOLLMAN, ARNOLD, and GRUENDER, Circuit Judges.

OPINION

GRUENDER, Circuit Judge.

Michael D. Loos brought two claims against BNSF Railway Company: a retaliation claim under the Federal Railroad Safety Act ("FRSA") and a negligence claim under the Federal Employers Liability Act ("FELA"). The district court[1] granted BNSF summary judgment on the retaliation claim, but the negligence claim proceeded to trial where a jury rendered a verdict in favor of Loos. Loos appeals the grant of summary judgment to BNSF on his retaliation claim. BNSF cross-appeals denial of its motion to offset the amount of tax BNSF argues the Railroad Retirement Tax Act ("RRTA") requires it to withhold from the judgment on Loos's FELA claim. For the following reasons, we affirm both decisions.

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1. The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

Appendix A

I. Background

Loos worked for BNSF for fifteen years as a conductor, brakeman, and switchman before BNSF fired him on November 29, 2012. During his employment, Loos made a number of safety reports, and he served on BNSF's site safety committee for an unspecified period in 2007 and 2008.[2] Between 2006 and his dismissal, Loos accumulated a number of attendance violations. The BNSF attendance policy allows each employee a certain number of absences during each three-month rolling period. If an employee exceeds the number of allowed absences during a given three-month period, BNSF disciplines the employee in accordance with a schedule of progressively increasing punishments. The first violation results in a formal reprimand, the second violation in a ten-day record suspension, the third in a twenty-day record suspension, and the fourth in a possible discharge. The employee also may be subject to dismissal, among other reasons, for having an active "Level S" violation (denoting a significant rule violation) on his record and accumulating three active attendance violations. Attendance violations remain active until the employee works one year without a new attendance violation. An employee may also request alternative handling, under which the employee agrees to participate in a plan designed to reduce future violations and, in return, does not receive an attendance violation.

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2. The record includes documents relating only to one safety report-a request Loos made in September 2007 for two defibrillators-but Loos testified he frequently filed safety reports and followed up with supervisors about them.

Appendix A

Loos violated the policy twice in 2006, receiving first a formal reprimand, then a ten-day record suspension. In 2008, Loos violated the policy twice, receiving alternative handling and then a formal reprimand. After the second 2008 violation, Loos received a letter from his supervisor explaining that Loos worked between about thirty and forty hours per month during October and November of 2008 while his peers worked an average of 170 hours per month. The supervisor warned him that continuing to work less than full-time work hours would be considered an attendance violation. However, on June 15, 2009, Loos admitted another attendance violation and received a Level S ten-day record suspension. On March 22, 2010, Loos violated attendance rules by failing to notify a supervisor of the nature of a family-emergency absence within twenty-four hours and received alternative handling. That same month, Loos violated the attendance policy again and received a Level S thirty-day record suspension. BNSF then placed Loos on a three-year probation period during which "[a]ny rules violation ... could result in further disciplinary action." Loos's attendance problems continued, and BNSF warned him in July 2010 that if he did not maintain full-time work hours, it would be considered another Level S violation.

On December 19, 2010, Loos twisted his knee when he fell into a snow-covered drainage grate in the train yard. He reported the workplace injury and missed work until May 16, 2011 when his orthopedist released him to work without restrictions. Later in May, Loos requested and was denied leave under the Family Medical Leave Act ("FMLA"), because he had not worked a sufficient number

of hours in the previous year to qualify. The FMLA request did not include a statement from his doctor or any other form of medical documentation. In the summer of 2011, Loos requested to use the "injury on duty" ("ION") code to take excused absences due to flare-ups of his knee injury. His supervisor, Matt Bailey, initially responded that the ION code was not available to him because "[w]e don't do it anymore."[3] When Loos pressed him further, Bailey stated, "I won't authorize it, and that's the end of it." In his deposition, Bailey clarified that the ION code is available, but it requires medical documentation and clearance through the medical department—a policy, Bailey admitted, that is not written down and which he did not communicate to Loos. Later in 2011, Loos violated the attendance policy twice, and he received first a formal reprimand and then a ten-day record suspension. Loos testified in his deposition that at least one of these violations resulted from injury flare-ups, but he ultimately admitted the violations and waived his right to a formal investigation both times. After the second 2011 violation, BNSF placed Loos on a one-year review period.

In January 2012 Loos testified on behalf of two former co-workers, Paul Gunderson and David Peterson, in a hearing before a Department of Labor administrative law judge considering Gunderson and Peterson's claims

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3. The testimony of two former BNSF employees, Donald Mullins and George Joyce, suggests that BNSF may have stopped allowing the ION code for injury flare-ups after it instituted the attendance policy, possibly because of the belief that classifying such absences as injuries on duty could render them reportable under FRSA as separate incidents of injury on duty.

against BNSF for retaliatory dismissal under FRSA.[4] BNSF authorized Loos's absence to testify, but, shortly after the hearing, it sent Loos an investigation notice relating to the day of work he missed to testify. In a related meeting, trainmaster Greg Jaeb, a supervisor, asked for a copy of the subpoena and stated that "this could be bad for you." It is unclear whether Jaeb was referring to Loos's testimony or to the effect of an attendance violation. BNSF did not ultimately require Loos to produce the subpoena and later canceled the investigation.

In the three-month period between May and July 2012, Loos missed eight-and-a-half weekdays and two weekend days. For that period, the attendance policy allowed him to miss only seven-and-a-half weekdays and no weekend days. He missed five days due to knee-injury flare-ups, two days (including Sunday, July 8) for personal reasons, and one-and-a-half days for a family emergency. During the three-month period, Loos had requested and was denied permission to use the "ION" code to designate his knee-injury-related absences as excused. BNSF emphasized that it denied Loos's request because he did not provide medical documentation. BNSF issued an investigation notice in August 2012 and held a formal investigation on November 16, 2012. In the interim, Loos submitted a second FMLA request in September 2012, including a statement from his doctor. At the hearing, Loos submitted a note from his doctor dated November 6, 2012, explaining that he would have to miss work because of knee-injury

4. This court considered Gunderson's claim earlier this year. See *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 963 (8th Cir. 2017).

flare ups and that these issues were present during May, June, and July of 2012. The BNSF investigator found that Loos had violated the attendance policy. Thus, as Loos had accumulated a total of three active attendance violations and an active Level S violation, BNSF dismissed Loos.

Loos filed suit on December 9, 2013, alleging that BNSF retaliated against him in violation of FRSA and that BNSF was liable under FELA for negligently causing his knee injury. The district court granted BNSF summary judgment on Loos's FRSA claim, but Loos's FELA claim proceeded to trial. The jury ruled in Loos's favor and awarded $85,000 for past pain, disability, and emotional distress; $30,000 for lost wages; and $11,212.78 for past medical expenses. BNSF moved under Federal Rule of Civil Procedure 59(e) for the court to offset the lost wages award by the amount of Loos's share of taxes owed under the RRTA. The district court found that no RRTA tax was owed on the award and denied BNSF's motion. In February 2016, BNSF partially satisfied the judgment, withholding from the payment the amount of the disputed RRTA taxes. Loos appeals summary judgment on his FRSA claim, and BNSF cross-appeals the district court's determination with respect to RRTA taxes.

II. Discussion

A. FRSA Retaliation Claim

"We review a district court's grant of a motion for summary judgment de novo, viewing all evidence and drawing all reasonable inferences in the light most

favorable to the nonmoving party." *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 726 (8th Cir. 2017) (quotation omitted). "Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quotations omitted). FRSA provides that a railroad "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done ... to notify ... the railroad carrier ... of a work-related personal injury" or to cooperate with a federal investigation. 49 U.S.C. § 20109(a)(1), (4), (5). A railroad likewise may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for ... reporting, in good faith, a hazardous safety or security condition." *Id.* § 20109(b)(1)(A). We analyze FRSA retaliation claims in two steps. First, the plaintiff must make a *prima facie* case. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(i)). If the plaintiff satisfies this requirement, the railroad has the opportunity to demonstrate by clear and convincing evidence that it would have discharged the employee even if he had not engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(b)(2)(B)(ii)).

To make a *prima facie* case, Loos must demonstrate: that (1) "he engaged in protected activity"; (2) BNSF "knew or suspected, actually or constructively, that he engaged in the protected activity"; (3) "he suffered an adverse action;" and (4) "the circumstances raise an inference that the protected activity was a contributing factor in the adverse action." *See id.* The parties do not dispute that

Loos engaged in protected activity of which BNSF was aware and that Loos suffered an adverse action. Thus, we need only determine whether a genuine dispute exists as to the final prong—whether the circumstances raise an inference that Loos's protected activity was a contributing factor to his discharge. "[A] contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* at 791 (quotation omitted). Though the employee need not "conclusively demonstrate the employer's retaliatory motive," *id.*, he must show that intentional retaliation prompted by a protected activity was a contributing factor, *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 722 (8th Cir. 2017).[5] To determine whether the circumstances raise an inference of retaliatory motive in the absence of direct evidence, we consider circumstantial evidence such as the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence of intervening events that independently justify discharge. *See DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 2012 WL 5, at *3 (U.S. Dep't of Labor Feb. 29, 2012); *Gunderson*, 850 F.3d at 969. The court also takes "into account the evidence of the employer's nonretaliatory reasons." *Gunderson*, 850 F.3d at 969 (quotation omitted).

5. Although Loos cites to *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013), which employs a more lenient standard, we explained in *Blackorby v. BNSF Railway Co.* that the Eighth Circuit follows *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014), not *Araujo*. 849 F.3d at 721-22.

Loos argues that BNSF dismissed him in retaliation for one or more of three protected activities: (1) submitting safety reports and serving on the safety committee, (2) reporting an on-duty injury, and (3) testifying in the Peterson-Gunderson FRSA hearing. None of these activities occurred in temporal proximity to Loos's discharge. Loos served on the safety committee between 2007 and 2008, approximately five years prior to his dismissal. Likewise, the safety report documented in the record occurred in 2007.[6] Loos reported his on-duty injury in 2010, almost two years prior to his dismissal, and he testified in the Peterson-Gunderson hearing approximately ten months prior to his dismissal. By comparison, Loos's attendance violations began before the protected activities occurred and continued consistently until his discharge. *Kuduk* explained that more than a temporal proximity is required to find retaliatory motive "especially ... when the employer was concerned about a problem before the employee engaged in the protected activity." 768 F.3d at 792 (quotation omitted). Here, not even temporal proximity is present, and BNSF's concern with Loos's attendance problems well predated the protected activities. Moreover, the violation that prompted Loos's dismissal occurred because Loos missed a weekend day for personal reasons and, thus, the violation was unrelated to any protected activity.

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6. Loos testified, and we assume as true for purposes of summary judgment, that he made other safety reports throughout his employment. However, he does not assert or provide evidence that such reports occurred in close proximity to his firing.

The thrust of Loos's argument is that BNSF retaliated against him by refusing to allow him to use the ION code when his injury flared up. Although using the ION code would not have prevented the 2012 attendance violation that ultimately prompted Loos's dismissal, it would have prevented his 2011 violations.[7] Without the 2011 violations, Loos would not have had a sufficient number of active attendance violations to qualify for dismissal under the policy.[8] Thus, the argument goes, if BNSF refused the ION code in retaliation for Loos reporting the injury, that retaliatory motive contributed to his dismissal. However, the evidence does not support the conclusion that BNSF acted with such a retaliatory motive.

When Loos requested to use the ION layoff code for flare-ups of his injury, the only medical documentation BNSF had was the letter from Loos's doctor releasing him to work without restriction. Loos did not provide any medical documentation until his September 2012 FMLA leave request and the November 2012 letter from his doctor explaining that flare-ups would have been occurring during May, June, and July of 2012. BNSF did not have either of these documents in 2011 when it

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7. We take as true for purposes of summary judgment Loos's testimony that one or both of these violations were due to injury flare-ups for which BNSF denied the ION code.

8. BNSF contends that Loos cannot now challenge his 2011 attendance violations because he admitted the violations and waived formal investigation, and the statute of limitations for such challenge has expired. We need not decide this question, because even if we consider the 2011 violations Loos has not presented sufficient evidence of retaliatory motive.

refused the ION code. Rather, the information BNSF had at the time it refused the ION code indicated that Loos was fit for work without restriction.[9] *See Gunderson*, 850 F.3d at 969 ("The critical inquiry in a pretext analysis is ... whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge." (quotation omitted)). Loos fails to provide evidence that this reason is inconsistent or pretextual. First, Loos points to testimony asserting that BNSF allowed another employee—Jake Kluver—to use the ION code for absences due to flare-ups of an injury after he was released to work without restriction. However, Loos has not carried his burden to demonstrate that Kluver was "similarly situated in all relevant respects." *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994). Loos did not present evidence that Kluver failed to provide medical documentation, and without evidence to that effect we cannot conclude that Kluver was similarly situated in all relevant respects and, thus, that his experience demonstrates BNSF acted inconsistently.

Loos emphasizes the testimony of Mullins and Joyce, two former BNSF employees who asserted that BNSF unofficially stopped allowing the ION code for injury flare-ups in 2000 when it instituted the attendance policy because of concerns its use would alter BNSF's injury-

9. Loos also emphasizes that the jury verdict in his FELA claim, which awarded damages for pain, disability, and emotional distress for a period including the 2011 violations, confirms that Loos was attempting to take time off because of his injury. However, this does not illuminate BNSF's intent at the time it disciplined Loos.

reporting obligations under FRSA.[10] The district court did not consider Mullins's and Joyce's testimony because Loos failed to disclose them as experts at the appropriate time. Loos does not expressly challenge this decision, but even if we consider Mullins's and Joyce's testimony, it does not support an inference of retaliatory motive. If BNSF indeed had an across-the-board practice of disallowing the ION code for injury flare-ups, the denial in Loos's case would not be evidence that BNSF intended to retaliate against him specifically for protected activity. As such, whether or not such a policy, if it existed, would be fair is not at issue here. *See Gunderson*, 850 F.3d at 970 ("[I]f the discipline was wholly unrelated to protected activity ... whether it was fairly imposed is not relevant to the FRSA causal analysis.").

Loos also points to a 2011 exchange between himself and Bailey, a supervisor, related to Loos's ION code request. Loos testified that Bailey refused to authorize the ION code because it was not available to him. When Loos pressed for further explanation, Bailey responded, "It's just not [available]. We don't do it anymore." This statement is susceptible to two interpretations. On the one hand, it supports Mullins's and Joyce's testimony that BNSF categorically denied ION code use for flare-ups after 2000. As described above, such a situation does not support an inference of retaliatory motive against Loos. Second, the statement may be interpreted to mean that Loos could not use the ION code anymore because he had been released to work without restriction. That

10. BNSF strongly contests this assertion.

interpretation, likewise, does not support an inference of retaliatory motive because it supports BNSF's explanation that it denied the ION code because Loos failed to provide the necessary medical documentation. Next, Loos points to an exchange that took place in 2010 or 2011 between Phillip Mullen, the terminal superintendent, and Jeremy Brown, a BNSF switchman and the switchmen's union local chairman, in which Mullen expressed significant frustration with Loos's low attendance during a monthly local chairmen's meeting. Nothing in the exchange implies that any scrutiny of Loos's attendance was a pretext to punish him for protected activities.

Loos's final argument with respect to the 2011 violations consists of the assertion that BNSF should have granted Loos FMLA leave in 2011, even though he was not eligible. This refusal to make a special exception to FMLA requirements, Loos contends, demonstrates retaliatory motive. We disagree. A railroad may refuse to make a policy exception without retaliatory motive, and Loos points to nothing else surrounding the FMLA denial that would indicate retaliatory motive drove that decision.

Likewise, the circumstances surrounding Loos's testimony in the Peterson-Gunderson hearing ultimately do not support an inference of retaliatory motive. After Loos testified at the hearing, he received an investigation notice for the day he missed to testify and Greg Jaeb, one of his supervisors, asked to see the subpoena. During the exchange, Jaeb opined that "this could be bad for you." Loos never produced the subpoena, and BNSF canceled the investigation. In order for Jaeb's

statements to constitute evidence of retaliatory motive on the part of BNSF, there must be "proof that a supervisor 'perform[ed] an act motivated by [discriminatory] animus that is ***intended*** by the supervisor to cause an adverse employment action ... if that act is a proximate cause of the ultimate employment action.' " *Gunderson*, 850 F.3d at 970 n.9 (alterations and omissions in original) (quoting *Kuduk*, 768 F.3d at 790). Even assuming it expresses retaliatory animus, no evidence in the record supports the conclusion that Jaeb's statement reflected the intent of BNSF or influenced the ultimate decision-maker. BNSF rescinded the investigation notice shortly after the exchange, and the attendance violation that led to Loos's dismissal was completely unrelated. Loos presented no evidence that Jaeb influenced John Wright, the BNSF investigator who presided over the November 2012 investigation hearing, or that the investigation itself resulted from Jaeb unfairly reporting Loos to superiors. *See Ludlow v. BNSF Ry. Co.*, 788 F.3d 794, 802 (8th Cir. 2015) (finding state-law retaliation where hostile supervisors provided the only source of information to the decision-maker, who in turn rubber-stamped their recommendations); *Richardson v. Sugg*, 448 F.3d 1046, 1060 (8th Cir. 2006) (explaining that if a decision-maker "makes an independent determination as to whether an employee should be terminated and does not serve as a mere conduit for another's discriminatory motives," that person's discriminatory motive is not a contributing factor).

Finally, Loos points to two exchanges during the investigation hearing that he contends demonstrate his dismissal was "preordained" and driven by retaliatory

motive. First, Loos argues that Wright was reluctant to admit into evidence Loos's September 2012 FMLA application and the November 6, 2012 doctor's note. This reluctance, Loos contends, demonstrates that the dismissal was "preordained." However, the record demonstrates that Wright merely questioned the relevance of medical documentation from September and November to a violation that occurred during May, June, and July. After stating this reservation, Wright admitted the evidence. The record does not support Loos's characterization of Wright's conduct as demonstrating he intended to discharge Loos regardless of what the evidence showed. Second, Loos points to an exchange between Loos's union representative, Jeff Pientka, and Wright. When Pientka harangued Wright at length for reasons unrelated to the subject of the investigation, Wright informed Loos that he would ask Loos to find a different union representative if Pientka could not refrain from disrupting the investigation. After Wright allowed Loos and Pientka a recess to confer, the investigation proceeded without further disruption. Loos characterizes this exchange as intimidating and evincing retaliatory intent, but the record does not support that conclusion.

In sum, the evidence does not raise a genuine dispute that retaliatory motive prompted by protected activity contributed to Loos's dismissal. As a result, Loos has failed to make a *prima facie* case and, accordingly, we affirm the district court's decision to grant BNSF summary judgment on Loos's FRSA retaliation claim.

B. RRTA Tax Withholding

In relation to Loos's successful FELA claim, BNSF cross-appeals the district court's denial of its Rule 59(e) motion seeking to set off the amount of RRTA tax that it argues it is required to withhold and to remit from the portion of Loos's recovery designated for lost wages. The district court denied the requested offset, determining that the income tax exclusion for personal-injury awards, *see* 26 U.S.C. § 104(a)(2), excepted the award for lost wages from RRTA taxation. We review for an abuse of discretion a district court's denial of a Rule 59(e) motion to amend or alter the judgment. *Avon State Bank v. BancInsure, Inc.*, 787 F.3d 952, 959 (8th Cir. 2015). However, "where the Rule 59(e) motion seeks review of a purely legal question," *id.* at 959 n.3, "the district court abuses its discretion if it makes a legal error," *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011).

The Railroad Retirement Act ("RRA"), 45 U.S.C. §§ 231-231v, is the railroad-industry equivalent to the Social Security Act ("SSA") and provides retirement benefits funded by employment taxes collected under the RRTA, 26 U.S.C. §§ 3201-02, 3211-12, 3221, 3231-33, 3341; *see Cowden v. BNSF Ry. Co.*, No. 4:08CV01534 ERW, 2014 WL 3096867, at *2 (E.D. Mo. July 7, 2014) (unpublished). The RRTA imposes two tiers of taxes, which are levied against both the employee and the employer based on the amount of the employee's compensation. *Cowden*, 2014 WL 3096867, at *2. Tier 1 taxes "are analogous to taxes imposed on nonrailroad workers by the Federal Insurance

Contributions Act (FICA)." *Id.* Tier 2 taxes provide benefits similar to a private multi-employer pension fund. *Id.* (citing *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 522 (6th Cir. 2009)). Though closely related, the RRA and RRTA are administered by separate administrative agencies (the Railroad Retirement Board ("RRB") and the Internal Revenue Service ("IRS"), respectively), *see id.*, and operate under separate regulations, *compare* 20 C.F.R. §§ 201-206, 209-12, 216-22, 225-30, 232-38, 240, 243, 250, 255, 258-62, 266, 295 (implementing the RRA) *with* 26 C.F.R. §§ 31.3201-02, 31.3211-12, 31.3221, 31.3231 (implementing the RRTA).

Both the RRA and the RRTA define the term "compensation." *See* 45 U.S.C. § 231(h); 26 U.S.C. § 3231(e). The RRA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers ... including remuneration paid for time lost as an employee." 45 U.S.C. § 231(h)(1). The RRA defines "pay for time lost" as "the amount [the employee] is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury." *Id.* § 231(h)(2). The RRB has interpreted that definition to encompass FELA judgment awards for lost wages and, thus, considers FELA judgment awards when calculating the employee's benefits. *See* Railroad Retirement Board, Railroad Retirement Service Credits and Pay for Time Lost 2 (2011).

The RRTA also defines "compensation" as "any form of money remuneration paid to an individual for services

rendered as an employee to one or more employers" but does not expressly include pay for time lost. 26 U.S.C. § 3231(e)(1). The IRS interprets "compensation" under the RRTA as having "the same meaning as the term wages in [FICA] ... except as specifically limited by the [RRTA] ... or regulation." 26 C.F.R. § 31.3231(e)–1(a)(1). The regulation further provides that "[t]he term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer ... as well as pay for time lost." *Id.* § 31.3231(e)–1(a)(3)-(4). Under this regulation, damages for lost wages fit well within the definition of "compensation." Loos challenges this interpretation of the RRTA.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, we must first determine whether "Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If so, "that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

Although damages for lost wages are a "form of money remuneration paid to an individual," the RRTA only considers such remuneration "compensation" if it is paid "for services rendered as an employee." In cases interpreting FICA, the Supreme Court has defined this

concept broadly to refer to "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66, 66 S.Ct. 637, 90 L.Ed. 718 (1946) (deeming the SSA to cover back pay); *United States v. Quality Stores, Inc.*, ——U.S. ——, 134 S.Ct. 1395, 1400, 188 L.Ed.2d 413 (2014) (relying on *Neirotko* to deem severance payments "wages" under FICA). However, we recently determined that the FICA definition cannot be imported into the RRTA because "instead of taxing payment for 'services,' the FICA taxes payment for 'employment,' which is defined broadly...." *Union Pac. R.R. Co. v. United States*, No. 16-3574, 865 F.3d 1045, 1053, 2017 WL 3254390 (8th Cir. Aug. 1, 2017) (citing 26 U.S.C. § 3121(b)). Accordingly, we cannot rely upon cases interpreting the language of FICA to expand the RRTA's definition of "services rendered" to encompass the entire employee-employer relationship generally. *Id.*

Under the RRTA's plain text, damages for lost wages are not remuneration "for services rendered." Damages for lost wages are, by definition, remuneration for a period of time during which the employee did not actually render any services. Instead, the damages compensate the employee for wages the employee should have earned had he been able to render services. Unlike FICA, the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not. *See* 26 U.S.C. § 3231(e)(1); *see also id.* § 3231(d) (defining "service"). Thus, damages for lost wages do not fit within the plain meaning of the RRTA.

On the other hand, BNSF and the Government contend that the RRA and RRTA are *in pari materia*, and, thus, we should read the RRA definition of "compensation" into the RRTA. The RRA and RRTA, they argue, accomplish a unified purpose: the RRA provides benefits, while the RRTA funds them. Thus, because the RRA expressly considers pay for time lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits. *See Phillips v. Chi. Cent. & Pac. R.R. Co.*, 853 N.W.2d 636, 649 (Iowa 2014); *accord Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29 (Sup.Ct.Pa. 2016) (considering the RRA and RRTA *in pari materia*). However, "[g]iven these linguistic differences, the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. Rather, the question is whether Congress intended its different words to make a legal difference." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). That Congress expressly included pay for time lost in the RRA's definition of "compensation" yet omitted it from the RRTA's definition of "compensation" suggests that Congress did not intend the RRTA to include pay for time lost.

The history of the RRTA confirms that this difference is intentional. Prior to 1975, the RRTA's definition of "compensation" expressly included "pay for time lost," using language and structure identical to that of the RRA:

> (1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee

to one or more employers, or as an employee representative, ***including remuneration paid for time lost as an employee,*** but remuneration paid for time lost shall be deemed earned in the month in which such time is lost....

(2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. ***An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury,*** and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

26 U.S.C. § 3231(e)(1), (2) (1970) (emphasis added). In 1975, Congress amended the RRTA to remove the express inclusion of "pay for time lost" within the definition of "compensation" in § 3231(e)(1), but it retained the definition of "pay for time lost" in § 3231(e)(2). *Cowden*, 2014 WL 3096867, at *5-6. In 1983, Congress further amended section 3231(e) to "remove[ ] all language addressing payments for time lost and for personal injury." *Id.* at *6. Thus, "[i]t is beyond dispute that the plain language of the RRTA once provided for payments for time lost on account of personal injury, but no longer does." *Phillips*, 853 N.W.2d at 647.

While BNSF and the Government's argument that the RRTA should tax what the RRA uses to calculate benefits makes sense as a statutory scheme, this was expressly the statutory scheme that existed before the 1983 amendments. We are not convinced that we should import from the RRA the very language Congress eliminated from the RRTA. While "under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law," *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006) (quotation omitted), the relationship between the RRTA and the RRA does not require it, *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (explaining that RRTA "taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled" under the RRA). Therefore, we conclude that we should not read the RRTA and the RRA *in pari materia* and that it is inappropriate to import the RRA's definition of "compensation" into the RRTA.

Accordingly, we conclude that the RRTA is unambiguous and does not include damages for lost wages within the definition of "compensation." Therefore, the regulations providing to the contrary receive no deference under *Chevron*, because "the agency[ ] must give effect to the unambiguously expressed intent of Congress."[11] 467 U.S. at 842-43, 104 S.Ct. 2778. Because we affirm the district court's decision on this alternate basis, we need not consider whether it was correct that 26 U.S.C. § 104(a)(2) applies to the RRTA.

III. CONCLUSION

For the foregoing reasons, we affirm both the district court's decision to grant summary judgment to BNSF on Loos's FRSA claim and its denial of BNSF's request for an offset from the lost-wages award.

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11. We give no consideration to Revenue Ruling 85-97, 1985-2 C.B. 5, 1985-29 I.R.B. 5, 1985 WL 287177 (1985), or Revenue Ruling 61-1, 1961-1 C.B. 14, 1996 WL 12630 (Jan. 1961), because neither revenue ruling is directly on point, and neither takes account of the 1983 amendments.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FILED DECEMBER 15, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 13-cv-3373 (PAM/FLN)
2015 WL 8779813

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Signed December 15, 2015

MEMORANDUM AND ORDER

Paul A. Magnuson, United States District Judge

This matter is before the Court on Defendant BNSF Railway Company ("BNSF")'s Motion for Collateral Source Offsets. (Docket No. 130.) For the reasons that follow, BNSF's Motion is granted in part and denied in part.

Appendix B

Plaintiff Michael Loos brought a FELA claim against BNSF, which proceeded to trial in September 2015. On September 15, 2015, the jury returned its verdict, finding in favor of Plaintiff and awarding (1) $85,000 for past pain, disability, and emotional distress, (2) $30,000 for past wage losses, and (3) $11,212.78 in past medical expenses. (Docket No. 126.) BNSF now moves for offsets on the damages award of $15,078.51. This figure includes (1) negotiated discounts provided by Plaintiff's health insurer of $4,911.51, (2) satisfaction of a $6,402.00 Railroad Retirement Board lien for Plaintiff's short-term sickness and unemployment benefits, and (3) satisfaction of BNSF's obligation to withhold and pay the Internal Revenue Service ("IRS") $3,765.00 for Plaintiff's share of Railroad Retirement Tax Act payroll taxes on his wage loss award. The parties agree that BNSF will be required to pay the Railroad Retirement Board $6,402.00, and that this amount should be offset. The remaining dispute relates to medical expenses and railroad retirement taxes.

BNSF argues that under Minnesota's collateral source statute, Minn. Stat. § 548.251, Loos's medical expenses should be deducted from the jury's award. Loos contends that federal law controls all substantive matters in FELA cases, and the FELA provision addressing set-offs should be applied. That provision states:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,*

> That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 55.

Loos is right. In FELA cases, issues must be determined by federal and not state law. *Dice v. Akron, C. & Y.R.R. Co.*, 342 U.S. 359, 361, 72 S. Ct. 312, 96 L. Ed. 398, 63 Ohio Law Abs. 161 (1952) ("[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."). BNSF cites *Adams v. Toyota Motor Corp.*, No. 10-2802, 2015 U.S. Dist. LEXIS 76903, 2015 WL 3742898, at *5 (D. Minn. June 15, 2015), to demonstrate that it is appropriate for federal courts to apply the state collateral source statute in a FELA case. But *Adams* was a design defect case based on diversity jurisdiction. Minnesota common law applied to the design-defect claim, so applying the state collateral source statute was warranted. Here, the FELA, a federal statute occupying the field of railroad employer liability for employee injuries and providing for set-offs, explicitly underlies Loos's claim in federal court. The FELA's set off provision, 45 U.S.C. § 55 applies.

BNSF asserts that Loos's health insurer, Medica, paid his medical expenses at a discounted rate, totaling $4,911.51 in discounts. The FELA's set-off provision states that a common carrier may set off amounts it paid or contributed to insurance that were paid to the injured employee. BNSF has not paid Loos's medical bills. Therefore, under the FELA, it is not entitled to a set-off. 45 U.S.C. § 55; *see also Clark v. Burlington N., Inc.*, 726 F.2d 448, 450 (8th Cir. 1984) ("Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums."). The damages award will not be set off by the amount of Loos's medical expenses.

BNSF also argues that railroad retirement taxes should be set off against the damages award. The Railroad Retirement Act (RRA), 45 U.S.C. § 231 et seq., provides railroad employees with social security-type benefits. *See Duckworth v. Allianz Life Ins. Co. of N. Am.*, 706 F.3d 1338, 1344 (11th Cir.2013) ("The provisions of the [RRA] are so closely analogous to those of the Social Security Act that regulations and cases interpreting the latter are applicable to the former."). The Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3201 et seq., is a subsection of the Internal Revenue Code that provides for taxing railroad employee compensation. 26 U.S.C. § 3201(a)-(b). This is executed through the use of a dual tax system "in which railroad employers must withhold their tax shares, as well as their employees' tax shares, and then provide both shares to the [IRS]." *Cowden v. BNSF Ry. Co.*, No. 4:08-cv-01534, 2014 U.S. Dist. LEXIS 91454, 2014 WL 3096867, at *2 (E.D. Mo. July 7, 2014) (citing

26 U.S.C. § 3201(a)-(b)). Tier 1 taxes are imposed against railroad employees and employers, and are "analogous to taxes imposed on nonrailroad workers by the Federal Insurance Contributions Act (FICA)." 2014 U.S. Dist. LEXIS 91454, [WL] at *2. Tier 2 taxes are also imposed against both railroad employees and employers. Tier 2 benefits "are similar to those that workers would receive from a private multi-employer pension fund." *Id.* (citation omitted) (internal quotation marks omitted).

According to BNSF, because the statutes at issue treat time lost on account of personal injury as compensation, taxes must be collected on the $30,000 wage-loss portion of Loos's damages award. BNSF argues that $3,765.00 should therefore be set off against the damages award. This amount represents the amount of railroad retirement taxes that BNSF claims it must withhold from Loos's compensation to pay to the IRS. Loos contends that a FELA judgment is not taxable compensation, and that railroad retirement taxes should not be withheld from the damages award, citing *Cowden*, 2014 U.S. Dist. LEXIS 91454, 2014 WL 3096867 (noting that although damages award under the FELA may be compensation, it is not taxable income under the Tax Code's personal injury exclusion, 26 U.S.C. § 104(a)(2)).

This Court agrees with Judge Webber's analysis in *Cowden*. There, the court pointed out that the RRA and the RRTA define compensation differently, and that the more relevant inquiry is whether damages on a FELA judgment qualify as "compensation" subject to withholding under the RRTA. *Cowden*, 2014 U.S. Dist. LEXIS 91454,

[WL] at *5. Under the RRTA, FELA judgments for lost pay fall within the definition of "compensation." 2014 U.S. Dist. LEXIS 91454, [WL] at *9. However, the Tax Code excludes "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of physical injuries or physical sickness" from the definition of income. 26 U.S.C. § 104(a)(2). Further, "when an award is received for a personal injury in a tort or tort-type proceeding, the whole award is excludable from income under 26 U.S.C. § 104(a), even if included in the award is an amount for lost earnings." *Cowden*, 2014 U.S. Dist. LEXIS 91454, [WL] at *11 (citation omitted) (internal quotation marks omitted). "Having conducted an extensive examination of relevant statutes, regulations, and cases," the *Cowden* court "simply [could not] conclude Congress intended to tax personal injury judgments under the RRTA," 2014 U.S. Dist. LEXIS 91454, [WL] at *4, and neither can this Court.

Accordingly, **IT IS HEREBY ORDERED** that BNSF's Motion for Collateral Source Offsets (Docket No. 130) is **DENIED IN PART** and **GRANTED IN PART**. The damages award will be offset by $6,402.00 to satisfy the Railroad Retirement Board lien, but no offsets for medical expenses or railroad retirement taxes will be applied.

Dated: December 15, 2015

/s/
Paul A. Magnuson
United States District Court Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED OCTOBER 26, 2017

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-1123

MICHAEL D. LOOS,

Appellee,

v.

BNSF RAILWAY COMPANY,

Appellant.

United States of America
Amicus on Behalf of Appellant(s)
American Association for Justice
Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the
District of Minnesota - Minneapolis
(0:13-cv-03373-PAM)

ORDER

The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

Appendix C

Judge Kelly did not participate in the consideration or decision of this matter.

October 26, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D — RELEVANT STATUTORY PROVISIONS

26 U.S.C.A. § 3231, I.R.C. § 3231

§ 3231. Definitions

Effective: December 19, 2014

Currentness

* * *

(e) Compensation.—For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee,

(ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically--either as an advance, as reimbursement or allowance--for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q) as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service"

for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases.--

(A) Compensation in excess of applicable base excluded.--

(i) In general.--The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded.--There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes.--Clause (i) shall not apply to--

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) **Applicable base.**--

(i) **Tier 1 taxes.**--Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) **Tier 2 taxes, etc.**--For purposes of--

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) **Successor employers.**--For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that--

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only--

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph

(A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

(7) Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(13)(B)(v), Dec. 19, 2014, 128 Stat. 4040]

(8) Treatment of certain deferred compensation and salary reduction arrangements.--

(A) Certain employer contributions treated as compensation.--Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation.--The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging.--The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions.--The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions.--The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such

payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options.--The term "compensation" shall not include any remuneration on account of--

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

* * *

(h) Tips constituting compensation, time deemed paid.--For purposes of this chapter, tips which constitute compensation for purposes of the taxes imposed by section 3201 shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received.

* * *

Appendix D

45 U.S.C.A. § 231

§ 231. Definitions

Currentness

For the purposes of this subchapter—

* * *

(h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231h of this title, the period during which such compensation will have been earned.

(2) An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

(3) Solely for purposes of determining amounts to be included in the compensation of an employee, the term "compensation" shall also include cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4) Tips included as compensation by reason of the provisions of subdivision (3) shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) of the Internal Revenue Code of 1986 [26 U.S.C.A. § 6053(a)] or, if no statement including such tips is so furnished, at the time received. Tips so deemed to be paid in any month shall be deemed paid for services rendered in such month.

(5) In determining compensation, there shall be attributable as compensation paid to an employee in

calendar months in which he is in military service creditable under section 231(b)(i)(2) of this title, in addition to any other compensation paid to him with respect to such months--

(i) for each such calendar month prior to 1968, $160;

(ii) for each such calendar month after 1967 and prior to 1975, $260; and

(iii) for each such calendar month after 1974, the amount which is creditable as such individual's "wages" under section 209(d) of the Social Security Act [42 U.S.C.A. § 409(d)].

(6) Notwithstanding the provisions of the preceding subdivisions of this subsection, the term "compensation" shall not include--

(i) tips, except as is provided under subdivision (3) of this subsection;

(ii) remuneration for service which is performed by a non-resident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 1101(a)(15) of Title 8, as amended, and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be;

(iii) remuneration earned in the service of a local lodge or division of a railway-labor-organization employer

with respect to any calendar month in which the amount of such remuneration is less than $25;

(iv) remuneration for service as a delegate to a national or international convention of a railway-labor-organization employer if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service";

(v) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability; and

(vi) an amount paid specifically--either as an advance, as reimbursement or allowance--for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment.

(7) The term "compensation" includes any separation allowance or subsistence allowance paid under any benefit schedule provided under section 701 of Title VII of the Regional Rail Reorganization Act of 1973 [45 U.S.C.A. § 797] and any termination allowance paid under section 702 of that Act [45 U.S.C.A. § 797a], but does not include any other benefits payable under that title [45 U.S.C.A. § 797 et seq.]. The total amount of any subsistence allowance paid under a benefit schedule provided pursuant to section 701 of the Regional Rail Reorganization Act of 1973 shall be considered as having been earned in the month in which the employee first timely filed a claim for such an allowance.

(8) Notwithstanding any other provision of this subchapter, for the purposes of sections 231b(a)(1), 231c(a)(1), and 231c(f)(1) of this title, the term "compensation" includes any payment from any source to an employee or employee representative if such payment is subject to tax under section 3201 or 3211 of the Internal Revenue Code of 1954 [26 U.S.C.A. §§ 3201, 3211].

* * *

Appendix D

26 C.F.R. § 31.3231(e)–1, Treas. Reg. § 31.3231(e)–1

§ 31.3231(e)–1 Compensation.

Currentness

<For statute(s) affecting validity,
see: 26 USCA § 3231(e)(1), (2).>

(a) Definition—(1) The term compensation has the same meaning as the term wages in section 3121(a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see § 31.3123–1.

(3) The term compensation is not confined to amounts

paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see § 31.3121(a)–3. For rules regarding the inclusion of fringe benefits in compensation, see § 31.3121(a)–1T.

(6) **Split-dollar life insurance arrangements.** See §§ 1.61–22 and 1.7872–15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

(b) Special Rules. (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of § 31.3231(b)–1.

No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

MICHAEL D. LOOS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the satisfaction of a FELA judgment that includes an award of lost wages subject to taxation under the Railroad Retirement Tax Act (RRTA)?

Table of Contents

Page

QUESTION PRESENTED i

INTRODUCTION 1

STATEMENT OF THE CASE 1

I. The Railroad Retirement Tax Act and related statutes. 1

II. The proceedings below. 4

REASONS FOR DENYING THE PETITION 6

I. There is no Circuit split. The Federal courts all agree FELA satisfactions are not taxable under the RRTA. 6

A. There is no Circuit split. 6

B. The District Courts agree FELA satisfactions are not taxable. 6

C. There is only an illusory State court split. ... 7

II. The Internal Revenue Service has not ruled that satisfaction of FELA judgments are subject to RRTA taxes. 9

III. The Eighth Circuit's decision does not conflict with this Court's decisions. 10

A. There is no conflict with *Nierotko* and *Quality Stores*. 10

B. The court below properly applied *Chevron*. 11

IV. This is not an ideal vehicle for the Court to address the question presented because the court below did not address the many other reasons why FELA satisfactions are not subject to RRTA taxes. 12

A. IRC §104(a)(2) excludes FELA judgments from taxation. 12

B. FELA awards of lost wages are not necessarily "pay for time lost." 14

CONCLUSION 16

Table of Authorities

Page

Cases

Anderson v. United States,
929 F.2d 648 (Fed. Cir. 1991) 13

Burlington N. & Santa Fe Ry. v. White,
548 U.S. 53 (2006) 8

Capovilla v. RRB,
924 F.2d 885 (9th Cir. 1991) 14

Chevron USA Inc. v. National Resources Defense Council,
467 U.S. 837 (1984) 11

Comm'r v. Schleier,
515 U.S. 323 (1995) 3, 13

Cowden v. BNSF Ry.,
No. 08-1534, 2014 U.S.Dist.LEXIS 91454 (E.D. Mo. July 7, 2014)
(2014 WL 3096867) 5, 8, 14, 16

CSX Corp. v. United States,
518 F.3d 1328 (Fed. Cir. 2008) 8

CSX Transp., Inc. v. McBride,
564 U.S. 685 (2011) 4

Dotson v. United States,
87 F.3d 682 (5th Cir. 1996) 13

Gerbec v. United States,
164 F.3d 1015 (6th Cir. 1999) 13

Hance v. Norfolk So. Ry.,
571 F.3d 511 (6th Cir. 2009) 6

Heckman v. Burlington N. Santa Fe Ry.,
837 N.W.2d 532 (Neb. 2013) 4, 8

Hisquierdo v. Hisquierdo,
439 U.S. 572 (1979) 1, 2, 11

Jacques v. RRB,
736 F.2d 34 (2d Cir. 1984) 14

Jimenez v. Quarterman,
555 U.S. 113 (2009) 11

Liberatore v. Monongahela Ry.,
2016 PA Super 79 8

Loos v. BNSF Ry.,
No. 13-3373, 2015 U.S.Dist.LEXIS 167603 (D. Minn. Dec. 15, 2015)(2015 WL 8779813) 7

Loy v. Norfolk S. Ry.,
No. 12-96, 2016 U.S.Dist.LEXIS 48824 (N.D. Ind. Apr. 12, 2016) 7, 8, 13, 16

Marlin v. BNSF Ry.,
163 F.Supp.3d 576 (S.D. Iowa 2016) 7, 8, 13

Mayo Found. For Med. Educ. & Research v. United States,
562 U.S. 44 (2011) 12

Mickey v. BNSF Ry.,
437 S.W.3d 207 (Mo. 2014) 7, 8, 14, 15, 16

Norfolk & W. Ry. v. Liepelt,
444 U.S. 490 (1980) 3, 13, 15

Norton v. RRB,
69 F.3d 282 (8th Cir. 1995) 14

Phillips v. Chi. Cent. & Pac. R.R.,
853 N.W.2d 636 (Iowa 2014) 8

Redfield v. Ins. Co. of N. Am.,
940 F.2d 542 (9th Cir. 1991) 13

Rowan Cos. v. United States,
452 U.S. 247 (1981) 11, 13

Social Sec. Bd. v. Nierotko,
327 U.S. 358 (1946) 10

Standard Office Bldg. Corp. v. United States,
819 F.2d 1371 (7th Cir. 1987) 2

United States v. Cleveland Indians Baseball Co.,
532 U.S. 200 (2001) 8, 11

United States v. Quality Stores, Inc.,
134 S.Ct. 1395 (2014) 8, 10

Windom v. Norfolk So. Ry.,
No. 10-407, 2012 U.S. Dist. LEXIS 173477
(M.D. Ga. 2012)(2012 WL 6096990) 7

Statutes

26 U.S.C. §104(a)(2) 3, 5, 8, 11, 13

26 U.S.C. §3101 13

26 U.S.C. §3101(b) 3

26 U.S.C. §3121 1

26 U.S.C. §3201 ..... 3, 12

26 U.S.C. §3201–§3241 2

26 U.S.C. §3202(a) 3

26 U.S.C. §3221 2

26 U.S.C. §3221(a) 2

26 U.S.C. §3221(b) 2

26 U.S.C. §3231(b) 3

26 U.S.C. §3231(d) 3

26 U.S.C. §3231(e)(1) 3

26 U.S.C. §3241 ..... 2, 3

38 U.S.C. §4301–§4333 6

45 U.S.C. §231(f)(1) 2

45 U.S.C. §231(h)(1) 2, 15
45 U.S.C. §231–§231v 1
45 U.S.C. §231a 2
45 U.S.C. §231b(a) 1
45 U.S.C. §231b(b) 1
45 U.S.C. §231b(b)(1) 1
45 U.S.C. §231b(j) 1
45 U.S.C. §231f 1
45 U.S.C. §51–§60 4
Pub. L. 75-162, 50 Stat. 307 (June 24, 1937) 1
Pub. L. 93-445, 88 Stat. 1305 (Oct. 16, 1974) 1

Regulations

20 C.F.R. §210.4 2
20 C.F.R. §211.14 2
26 C.F.R. §31.3231(e)-1(a)(3)–(4) 5, 15
Definition of Compensation for Purposes of the Railroad Retirement Tax Act, 44 Fed. Reg. 15484 (Mar. 14, 1979) 9
Republication of Regulations, 25 Fed. Reg. 13032 (Dec. 20, 1960) 9

Other Authorities

8th Cir. Civil Jury Instr. §15.73 (2017) 15
Lawsuits, Awards, and Settlements Audit Techniques Guide (5/2011) 13
Memorandum from the Office of Chief Counsel (October 22, 2008) 13
Rev. Rul. 61-1, 1961-1 C.B. 14 (Jan. 1961) 10, 14
Rev. Rul. 85-97, 1985-2 C.B. 50 (July 1985) 10

RRB, *Railroad Retirement Service Credits and Pay for Time Lost* 14, 15

INTRODUCTION

No Federal court has held that the satisfaction of a FELA judgment is taxable under the RRTA. Only one Circuit Court, the court below, has addressed the question presented. It, and every District Court that has addressed the question, concludes that FELA satisfactions are not taxable. The three State courts that have held otherwise provide no sound reasoning against the conclusion of all the Federal courts. There is no issue for this Court to decide. The Court should deny BNSF's petition.

STATEMENT OF THE CASE

I. The Railroad Retirement Tax Act and related statutes.

Railroad employees participate in a pension system under the Railroad Retirement Act (RRA, 45 U.S.C. §§231–231v), which is administered by the Railroad Retirement Board (45 U.S.C. §231f).[1] This is in lieu of participation in the Social Security system. Benefits under the RRA are provided in two tiers. Tier 1 benefits are the railroad equivalent of Social Security benefits. 45 U.S.C. §231b(a); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574–75 (1979). Tier 2 benefits are a "supplemental annuity" that is based on years of service and the average of the employee's highest 60 months of compensation. 45 U.S.C. §231b(b). The monthly compensation used to calculate these benefits is the amount reported by the railroad employer and is limited to 1/12 of the maximum annual taxable wages under 26 U.S.C. §3121 (FICA). 45 U.S.C. §§231b(b)(1), 231b(j); 20

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[1] The current RRA was enacted in 1974. Pub. L. 93-445, 88 Stat. 1305 (Oct. 16, 1974). The original RRA was enacted in 1937. Pub. L. 75-162, 50 Stat. 307 (June 24, 1937).

C.F.R. §211.14. "Compensation" under the RRA "means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers ..., including remuneration paid for time lost as an employee[.]" 45 U.S.C. §231(h)(1) (Pet. 41a).

Each benefit has different eligibility requirements, including different required minimum years of service, calculated as any twelve months, consecutive or not. 45 U.S.C. §231a; 45 U.S.C. §231(f)(1); 20 C.F.R. §210.4.

RRA benefits are funded by taxes imposed by the Railroad Retirement Tax Act (RRTA, 26 U.S.C. §§3201–3241), which is Chapter 22 of the Internal Revenue Code. The RRTA was originally enacted in 1937. *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1372 (7th Cir. 1987). The RRTA is administered by the IRS. The taxes imposed by the RRTA do not necessarily correlate with the benefits that an employee might receive. *Hisquierdo*, 439 U.S. at 574–75.

The employer's RRTA tax is an *excise* tax based on "compensation paid during any calendar year by such employer for services rendered to such employer." 26 U.S.C. §3221. The Tier 1 rates are the same as under FICA. 26 U.S.C. §3221(a). The Tier 2 rate is determined annually by the RRB based upon the investment performance of and distributions from the Railroad Retirement Account and the National Railroad Retirement Investment Trust. 26 U.S.C. §3221(b), §3241.

The employee's RRTA tax is an *income* tax, "imposed on the income of each employee" and calculated as a "percentage of the compensation received during any calendar year by such employee for services rendered by such employee." 26 U.S.C.

§3201.[2] Tier 1 taxes are calculated in the same manner as under FICA and Tier 2 taxes are calculated by the RRB in a manner similar to the employer's tax. 26 U.S.C. §3201, §3241. Part of the Tier 1 tax rate under FICA is a 1.45% Medicare tax that has no income limit and a 0.9% surtax on the employee's total annual income that exceeds $200,000 ($250,000 for joint filers). 26 U.S.C. §3101(b) (Hospital insurance). The employer must collect the employee's RRTA taxes "from the compensation of the employee as and when paid." 26 U.S.C. §3202(a).

An "employee" for purposes of the RRTA is an "individual in the service of" an employer for "compensation." 26 U.S.C. §3231(b). To be in the "service" of an employer, the employee must be "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" and providing the service for "compensation." 26 U.S.C. §3231(b), (d). "Compensation" is "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. §3231(e)(1) (Pet. 33a).

Section 104(a)(2) of the Internal Revenue Code provides that "gross income does not include ... the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. §104(a)(2). That exclusion applies even to injury awards that include an award of lost wages. *Comm'r v. Schleier*, 515 U.S. 323, 329–30 (1995); *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 496 (1980).

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[2] BNSF significantly errs in contending that the tax is imposed on the employee's "compensation." Pet. 5.

The Federal Employers' Liability Act (FELA, 45 U.S.C. §§51–60), enacted in 1908, holds a railroad liable to its employee for injuries caused by the railroad's negligence. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688 (2011). Hundreds of millions of dollars in damages have been paid by railroads to their employees under the FELA. Pet. 22. Neither BNSF nor the United States in the court below, nor BNSF in its petition to this Court, identified any Federal authority in the 80-year coexistence of the FELA and RRTA that declares a satisfaction of a FELA judgment is taxable under the RRTA.[3] This contention first arose in 2013, when BNSF itself argued that it must deduct from its satisfaction of a FELA judgment amounts it claimed were due under the RRTA. Pet. 22; *Heckman v. Burlington N. Santa Fe Ry.*, 837 N.W.2d 532 (Neb. 2013). No IRS regulation expressly states that FELA satisfactions are subject to RRTA taxation.

II. The proceedings below.

BNSF's negligence physically injured Michael Loos. Pet. 4a, 7a. Loos filed suit to recover for his injuries under the FELA on December 9, 2013. Pet. 7a. By that time, BNSF had already terminated his employment. Pet. 7a. On September 15, 2015 a jury returned a verdict awarding Loos total damages of $126,213, which included $85,000 for past pain, disability, and emotional distress, $11,213 in past medical expenses, and $30,000 in past wage loss. Pet. 7a, 26a.

BNSF moved to offset the verdict by the amount it claimed was due for RRTA withholdings. Pet. 28a.

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[3] Even the American Association of Railroads, in its proposed amicus brief, fails to cite any instance in which the IRS has pursued a railroad for RRTA taxes due on FELA judgments the railroad satisfied without withholding RRTA taxes.

The court denied BNSF's motion, concluding that since the satisfaction of the judgment was excluded from taxable income by IRC §104(a)(2), it was not subject to withholding under the RRTA. Pet. 29a–30a (citing *Cowden v. BNSF Ry.*, No. 08-1534, 2014 U.S.Dist.LEXIS 91454 (E.D. Mo. July 7, 2014)(2014 WL 3096867)).

The Court of Appeals for the Eighth Circuit affirmed that decision, but on different grounds. Pet. 17a–24a. It found that the RRTA unambiguously limited "compensation" to "money remuneration paid to an individual for services rendered as an employee[.]" Pet. 18a–19a. The Court rejected the IRS's interpretation of "compensation" to extend to "amounts paid for an identifiable period during which the employee is absent from the active service of the employer ... as well as pay for time lost" (26 C.F.R. §31.3231(e)-1(a)(3)–(4)) because it contradicted the plain meaning of §3231(e)(1) and because Congress twice amended the RRTA to remove any reference to "pay for time lost" as a form of "compensation[.]" Pet. 21a–23a. The Eighth Circuit rejected BNSF's argument for conforming the RRTA's definition of compensation to the RRA's definition for the same reasons. Pet. 21a–24a.

The Eighth Circuit did not address IRC §104(a)(2) or Loos's other arguments as to why a FELA satisfaction is not "pay for time lost" or "compensation" under the RRTA. Pet. 24a.

REASONS FOR DENYING THE PETITION

I. There is no Circuit split. The Federal courts all agree FELA satisfactions are not taxable under the RRTA.

A. There is no Circuit split.

Among the Courts of Appeals only the Eighth Circuit has addressed the question presented, in the case below. Contrary to BNSF's assertion, the Sixth Circuit did not address this question. *Cf.* Pet. 13–14 (citing *Hance v. Norfolk So. Ry.*, 571 F.3d 511 (6th Cir. 2009)(per curiam)). *Hance* did not involve an award for physical injuries under the FELA. It addressed a wrongful discharge claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. §§4301–4333), in which Hance sought reinstatement to his railroad employment, back pay, and an "award of damages equivalent to Railroad Retirement Tax Act (RRTA) contributions that Norfolk Southern would have made on Hance's behalf had he not been discharged." *Id.* at 515, 522. Hance was ordered reinstated and awarded his back pay, which would result in the railroad's reporting of RRTA compensation and Hance receiving the RRA credits he sought. *Id.* at 522–23. In contrast, Loos did not seek and was not awarded damages equivalent to RRTA contributions that BNSF would have made on Loos's behalf had he not been injured. Loos did not seek reinstatement to his employment and was not a BNSF employee when BNSF partially satisfied his judgment.

B. The District Courts agree FELA satisfactions are not taxable.

All the District Courts that have addressed the question presented have concluded that FELA

satisfactions are not subject to RRTA taxes. *Loy v. Norfolk S. Ry.*, No. 12-96, 2016 U.S.Dist.LEXIS 48824 (N.D. Ind. Apr. 12, 2016); *Marlin v. BNSF Ry.*, 163 F.Supp.3d 576 (S.D. Iowa 2016); *Loos v. BNSF Ry.*, No. 13-3373, 2015 U.S.Dist.LEXIS 167603 (D. Minn. Dec. 15, 2015)(2015 WL 8779813); *Cowden*, 2014 U.S.Dist.LEXIS 91454; *Windom v. Norfolk So. Ry.*, No. 10-407, 2012 U.S. Dist. LEXIS 173477 (M.D. Ga. 2012)(2012 WL 6096990). Although those decisions contain various reasons, some of which the Eighth Circuit rejected or did not address, they all agree FELA satisfactions are not taxable.

Because there is no conflict among the Federal courts that have addressed the question presented, there is no split for this Court to resolve. Although the question of whether FELA satisfactions are subject to RRTA taxes is certainly important, the fact that the Federal courts have unanimously agreed they are not, and the fact that the IRS has never formally ruled that they are despite the 80-year existence of the RRTA, and the apparent fact that the IRS has never sought from railroads payment of RRTA taxes on the hundreds of millions of dollar in FELA judgments they have paid, means that there is no need for the Court to consider this question in this case.

C. There is only an illusory State court split.

While four State courts have reached different conclusions on RRTA taxation of FELA judgments, the split is illusory given the more thorough reasoning of the Missouri Supreme Court, which concluded FELA judgments are not taxable. *Mickey v. BNSF Ry.*, 437 S.W.3d 207, 210–16 (Mo. 2014)(en

banc);[4] *cf. Heckman*, 837 N.W.2d 532; *Phillips v. Chi. Cent. & Pac. R.R.*, 853 N.W.2d 636 (Iowa 2014). District Courts also have rejected *Heckman* and *Phillips*. *Marlin*, 163 F.Supp.3d at 580–81; *Loy*, 2016 U.S.Dist.LEXIS 48824, at *13; *Cowden*, 2014 U.S.Dist.LEXIS 91454, at *31–32. *Heckman* and *Phillips* also fail to address the Code's exclusion from taxation of *any* portion of an award for personal physical injury. 26 U.S.C. §104(a)(2); *Cowden*, 2014 U.S.Dist.LEXIS 91454, at *26–29 (citing *CSX Corp. v. United States*, 518 F.3d 1328, 1343 (Fed. Cir. 2008), and *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1405 (2014), among others); *Mickey*, 437 S.W.3d at 211.

The Pennsylvania court of appeals followed *Heckman* and *Phillips* and rejected *Mickey* for reasons that are unpersuasive. *Liberatore v. Monongahela Ry.*, 2016 PA Super 79. That court addressed §104(a)(2), but rejected its application to the RRTA in light of the RRA's definition of compensation to include pay for time lost on account of personal injury. *Id.* at 13–27. It did not explain why satisfactions of FELA judgments that do not expressly include awards of RRTA compensation are "pay for time lost" and did not address this Court's rejection of reading the taxing and benefits statutes underlying Social Security as *in pari materia*. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212–13 (2001). The court below rejected *Liberatore* because it concluded Congress intended "compensation" to have different meanings in the RRTA and RRA. Pet 21a (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62–63 (2006)). No other court has relied on *Liberatore*.

The three State court decisions that erroneously concluded that FELA judgments are taxable have

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[4] BNSF did not petition for a writ of certiorari.

been rejected by every Federal court that has examined them. They provide no reason for this Court to issue a writ in this case.

II. The Internal Revenue Service has not ruled that satisfaction of FELA judgments are subject to RRTA taxes.

In addition to the lack of any Federal court split in opinion or real conflict among State courts that have thoroughly examined the question, the IRS itself has not formally declared that satisfaction of a FELA judgment is taxable under the RRTA. At one time, the RRTA regulations *did* specify that "compensation" included "a payment ... made to an employee *with respect to a personal injury* [that] includes pay for an identifiable period of absence from active service." Republication of Regulations, 25 Fed. Reg. 13032, 13067 (Dec. 20, 1960) (§31.3231(e)-1(b)(3), (emphasis added). The IRS, however, deleted that subparagraph (b)(3) from the regulation in 1979. Definition of Compensation for Purposes of the Railroad Retirement Tax Act, 44 Fed. Reg. 15484, 15484–85 (Mar. 14, 1979). To the extent a payment with respect to a personal injury for an identifiable period of absence from active service means an award of lost wages in a FELA judgment (*cf.* Part IV.B., *infra*), this revision demonstrates payment of that judgment is *not* "compensation" under the current version of the RRTA. The IRS has not issued any regulation or guidance since then indicating that it now considers satisfaction of FELA judgments to be "compensation" or "income" taxable under the RRTA.

The two revenue rulings that BNSF cites apply only to settlement agreements in which the railroad and employee agreed to apportion part of a payment to time lost for the purpose of providing the employee

railroad retirement credit. Rev. Rul. 61-1, 1961-1 C.B. 14 (Jan. 1961); Rev. Rul. 85-97, 1985-2 C.B. 50 (July 1985). The 1985 Ruling does not concern a railroad employee and only paraphrases Ruling 61-1. Such a payment is similar to the award in *Hance*, and is wholly dissimilar to Loos's case, since he did not request such an award and was not BNSF's employee when BNSF partially satisfied his judgment or even when he commenced his FELA action. The Eighth Circuit properly rejected consideration of those rulings. Pet 24a.

III. The Eighth Circuit's decision does not conflict with this Court's decisions.

A. There is no conflict with *Nierotko* and *Quality Stores*.

Neither *Nierotko* nor *Quality Stores* address whether awards of lost wages as part of a personal physical injury judgment are subject to taxation under FICA. Nor can they be construed to compel an interpretation of the RRTA to impose taxes on FELA satisfactions. *Nierotko* holds that an employee awarded back pay as a remedy along with reinstatement to his employment under the NLRA is entitled to have that back pay credited to his Old Age and Survivors Insurance Account. *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 364–66 (1946). In that case, the employee received the back pay while still an employee of the employer (since he had been reinstated). That does not address whether a payment of lost wages to a plaintiff as part of his personal physical injury damages after he no longer is an employee is "compensation" or "income" under the RRTA or even "wages" under FICA.

Quality Stores holds that severance payments are "wages" under FICA in part because they are taxable

income. 134 S.Ct. at 1404–05 (citing *Rowan Cos. v. United States*, 452 U.S. 247 (1981)). This Court recognizes that "wages" should be construed in the same manner for income tax purposes as for the income-tax withholding statutes and FICA. *Rowan*, 452 U.S. 247, 254. The decision below is entirely consistent with *Rowan*, since physical injury awards that include lost wages are exempt from income taxation under IRC §104(a)(2) and therefore must be exempt from RRTA taxation, just as they would be exempt from FICA taxation.

B. The court below properly applied *Chevron*.

The Eighth Circuit's decision does not conflict with *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). The court followed *Chevron* by first examining the RRTA's definition of "compensation" and concluding that it unambiguously does not include "pay for time lost" (which the Court assumed includes satisfaction of FELA judgments even though Loos argued otherwise). Pet. 18a–23a. BNSF attempts to create an ambiguity by importing the RRA's broader definition of "compensation" into the RRTA, but the Eighth Circuit properly rejected that. Pet. 21a; *Cleveland Indians*, 532 U.S. at 212–13 (Social Security Act and FICA are not *in pari materia*); *Hisquierdo*, 439 U.S. at 574–75 (no direct relation between RRTA taxes and RRA benefits). When the statutory language is plain, the Court must enforce it according to its terms, as the Eighth Circuit did. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Chevron*, 467 U.S. at 843.

Even if the Court decided the court below misinterpreted the RRTA (and there are other arguments why the RRTA does not compel taxation

of FELA satisfactions), the Court would have to determine whether the IRS has issued a rule interpreting "income" or "compensation" to include FELA satisfactions, and then determine whether that rule is a reasonable interpretation of the statute. *Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011). As noted *supra*, the IRS has not issued such a rule and, in fact, expressly amended its §3231 regulation to remove any reference to personal injury awards.

IV. This is not an ideal vehicle for the Court to address the question presented because the court below did not address the many other reasons why FELA satisfactions are not subject to RRTA taxes.

This case is not an ideal vehicle for the Court to determine whether a satisfaction of a FELA judgment is subject to RRTA taxation primarily because the Eighth Circuit's decision is correct and reaches the same conclusion as all other Federal courts that have addressed the question presented. Moreover, the court below did not address all of the reasons why FELA satisfactions are not taxable, which this Court would have to address were it to find error in the specific reasoning for the Eighth Circuit's decision. Among the points the court below did not address are that IRC §104(a)(2) excludes FELA judgments from taxation and that FELA awards of lost wages are not necessarily awards of "pay for time lost."

A. IRC §104(a)(2) excludes FELA judgments from taxation.

The employee's portion of the RRTA tax is imposed on the employee's "income[.]" 26 U.S.C. §3201.

Section 104(a)(2) provides that "gross income does not include ... the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. §104(a)(2). That exclusion applies even to injury awards that include an award of lost wages. *Schleier*, 515 U.S. at 329–30; *Liepelt*, 444 U.S. at 496.

Since such awards are not income taxable, they also are not subject to FICA taxes or withholding. *Gerbec v. United States*, 164 F.3d 1015, 1025 (6th Cir. 1999); *Dotson v. United States*, 87 F.3d 682, 689–90 (5th Cir. 1996)(citing *Rowan*, 452 U.S. at 254, and *Anderson v. United States*, 929 F.2d 648, 654 (Fed. Cir. 1991)); *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991).[5] This is a conclusion also recognized by the IRS. "Amounts excludable from gross income under §104(a)(2) ... are not wages for FICA and income tax withholding purposes." Memorandum from the Office of Chief Counsel at 8 (October 22, 2008)(non-precedential);[6] *see also* Lawsuits, Awards, and Settlements Audit Techniques Guide at 14 (5/2011)("There is general agreement that to the extent damages are excludable from gross income, they are not subject to employment taxes.").[7] The IRS has not stated otherwise for purposes of "income" or "compensation" under the RRTA.

For these reasons, §104(a)(2) excludes all FELA judgments from taxation under the RRTA. *Marlin*, 163 F.Supp.3d at 579–81; *Loy*, 2016 U.S.Dist.LEXIS

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[5] Like the RRTA, FICA also imposes the employee portion of its tax on the employee's "income." 26 U.S.C. §3101.

[6] http://www.irs.gov/pub/lanoa/pmta2009-035.pdf.

[7] http://www.irs.gov/pub/irs-utl/lawsuitesawardssettlementa.pdf.

48824 at *6–12; *Cowden*, 2014 U.S.Dist.LEXIS 91454 at *25–29; *Mickey*, 437 S.W.3d at 210–11.

B. FELA awards of lost wages are not necessarily "pay for time lost."

BNSF cites no authority for its contention that "pay for time lost" in the RRA and the RRTA regulations is the same as a FELA injury award that includes an award of lost wages. The court below also did not address Loos's arguments why they are not.

The RRA and RRTA regulations use the specific phrase "pay for time lost" instead of a more comprehensive phrase such as "payment of lost wages." That suggests a difference in meaning. A "pay for time lost" is a deliberate payment of "compensation" by agreement between the railroad and employee expressly for the purpose of providing the employee enough "years of service" to be eligible for RRA benefits. *Norton v. RRB*, 69 F.3d 282 (8th Cir. 1995); *Capovilla v. RRB*, 924 F.2d 885, 886 (9th Cir. 1991); *Jacques v. RRB*, 736 F.2d 34 (2d Cir. 1984); Rev. Rul. 61-1. The purpose of a "pay for time lost is to treat the employee as if he or she had actually performed compensated service during that period of time[.]" RRB, *Railroad Retirement Service Credits and Pay for Time Lost.*[8] A pay for time lost is "often intended to provide an employee with additional months of creditable service needed to qualify for railroad retirement benefits." *Id.* A properly designated "pay for time lost" is treated as if the employee actually received remuneration for services rendered during the designated period (months in which the time was lost). *See* 45 U.S.C.

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[8] https://www.rrb.gov/opa/qa/pub_0805.asp. This RRB publication says nothing about FELA judgments or satisfaction of FELA judgments.

§231(h)(1)(including as "compensation" "remuneration paid for time lost as an employee"), §231(h)(2) (payments for personal injury and time lost deemed all for time lost unless specifically apportioned otherwise). Such effective remuneration for the overall employment relationship could be treated as "compensation" under the RRTA. *Railroad Retirement Service Credits and Pay for Time Lost*, at 8–9; 26 C.F.R. §31.3231(e)-1(a)(3)–(4) (Pet. 46a–47a); *see also Hance*, 571 F.3d at 522–23.

Such a payment for time lost from the employer to an employee is distinct from an award to compensate an injured employee for the net income he would have received had he not been injured. An employee who seeks compensation for his lost wages is seeking to recover his take-home pay, net of all taxes and deductions. An employee who is seeking, in addition to his take-home pay, a report of creditable compensation for purposes of qualifying for or enhancing his RRA benefits is seeking to have his *gross* (pre-tax) compensation reported to the RRB as creditable compensation in specific amounts for specific months. While that award of creditable compensation might be taxable under the RRTA, that does not mean the employee's net take-home pay should also be taxed. FELA juries are instructed that their FELA awards are not taxable and that awards of lost earnings must be based on after-tax earnings. *Liepelt*, 444 U.S. 497–98; 8th Cir. Civil Jury Instr. §15.73 (2017).

The employee-plaintiff should decide whether he gets non-taxable, net take-home pay as his damage award and whether he gets taxable gross compensation so as to receive specific RRA credits. The RRA is designed for the remedial purpose of benefitting *employees*. *Mickey*, 437 S.W.3d at 215. Allocating satisfactions of FELA judgments to "pay for time lost" against the employee's wishes provides

no benefit to the employee, it only harms the employee by providing him less than full satisfaction of his FELA judgment. It also subjects what is supposed to be an award of after-tax take-home pay to double taxation.

The threat of that discounted satisfaction allows railroads to coerce injured employees to take less than their full damages in a settlement that allocates nothing to pay for time lost and thus is not taxable. While in this case Loos would suffer a discount of only $3,765, in cases with larger damages awards the consequences are more severe. *Loy*, for example, concerned a $29,247.25 tax liability. 2016 U.S.Dist. Lexis 48824 at *2.

It is not reasonable to construe the RRA's remedial provisions to be a means by which railroad employers can force employees to take unwanted "pay for time lost" at the railroad's election and suffer a diminution of the employee's award of damages under FELA. *Mickey*, 437 S.W.3d at 215; *Cowden*, 2014 U.S.Dist.LEXIS 91454 at *7 ("the Court simply cannot conclude Congress intended to tax personal injury judgments under the RRTA").

Because of the limited attention the question presented has received in the lower courts, the question presented here is not ripe for the Court's review. The Court should allow the lower courts to address the question and more clearly define what, if any, conflicts this Court must resolve. As it is, the lower courts continue to find FELA satisfactions are not taxable. So long as that continues, there is no issue for this Court to resolve.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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APPENDIX

CONTENTS

26 U.S.C. §104(a)(2). Compensation for injuries or sickness..... 1a

26 U.S.C. §3101. Rate of Tax..... 1a

26 U.S.C. §3201. Rate of tax [on Employees]. 2a

26 U.S.C. §3202. Deduction of tax from compensation. 2a

26 U.S.C. §3221. Rate of tax [on Employers]..... 3a

26 U.S.C. §3231. Definitions 3a

26 U.S.C. §3241. Determination of tier 2 tax rate based on average account benefits ratio..... 9a

45 U.S.C. §231a. Annuity eligibility requirements. 10a

45 U.S.C. §231b. Computation of annuities 12a

26 U.S.C. §104(a)(2). Compensation for injuries or sickness.

(a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include— ...

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

****

26 U.S.C. §3101. Rate of Tax

(a) Old-age, survivors, and disability insurance. In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to 6.2 percent of the wages (as defined in section 3121(a)) received by the individual with respect to employment (as defined in section 3121(b)).

(b) Hospital insurance.

(1) In general. In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to 1.45 percent of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)).

(2) Additional tax. In addition to the tax imposed by paragraph (1) and the preceding subsection, there is hereby imposed on every taxpayer (other than a corporation, estate, or trust) a tax equal to 0.9 percent of wages which are received with respect to employment (as defined in section 3121(b)) during any taxable year beginning after December 31, 2012, and which are in excess of—

(A) in the case of a joint return, $250,000,

(B) in the case of a married taxpayer (as defined in section 7703) filing a separate return, 1/2 of the dollar amount determined under subparagraph (A), and

(C) in any other case, $200,000.

***

26 U.S.C. §3201. Rate of tax [on Employees].

(a) Tier 1 tax. In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3101 for the calendar year.

(b) Tier 2 tax. In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.

(c) Cross reference. For application of different contribution bases with respect to the taxes imposed by subsections (a) and (b), see section 3231(e)(2).

26 U.S.C. §3202. Deduction of tax from compensation.

(a) Requirement. The taxes imposed by section 3201 shall be collected by the employer of the taxpayer by deducting the amount of the taxes from the compensation of the employee as and when paid.

....

(b) Indemnification of employer. Every employer required under subsection (a) to deduct the tax shall be liable for the payment of such tax and shall not be

liable to any person for the amount of any such payment.

****

26 U.S.C. §3221. Rate of tax [on Employers]

(a) Tier 1 tax. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the applicable percentage of compensation paid during any calendar year by such employer for services rendered to such employer. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3111 for the calendar year.

(b) Tier 2 tax. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the percentage determined under section 3241 for any calendar year of the compensation paid during such calendar year by such employer for services rendered to such employer.

****

26 U.S.C. §3231. Definitions

****

(b) Employee. For purposes of this chapter, the term "employee" means any individual in the service of one or more employers for compensation. The term "employee" includes an officer of an employer. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

****

(d) Service. For purposes of this chapter, an individual is in the service of an employer whether his service is rendered within or without the United States, if –

(1) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and

(2) he renders such service for compensation;

except that an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States, only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if ....

(e) Compensation. For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with

sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes

due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases.

(A) Compensation in excess of applicable base excluded.

(i) In general. The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded. There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes. Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base.

(i) Tier 1 taxes. Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc. For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act), clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers. ...

***

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad

Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

(7) The term "compensation" shall not include any contribution, payment, or service provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans).

(8) Treatment of certain deferred compensation and salary reduction arrangements. ...

(9) Meals and lodging. The term "compensation" shall not include the value of meals or lodging

furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions. ...

(11) Health savings account contributions. ...

(12) Qualified stock options. ...

****

26 U.S.C. §3241. Determination of tier 2 tax rate based on average account benefits ratio.

(a) In general. For purposes of sections 3201(b), 3211(b), and 3221(b), the applicable percentage for any calendar year is the percentage determined in accordance with the table in subsection (b).

(b) Tax rate schedule

Average account benefits ratio		Applicable percentage for sections 3211(b) and 3221(b)	Applicable percentage for section 3201(b)
At least	But less than		
	2.5	22.1	4.9
2.5	3.0	18.1	4.9
3.0	3.5	15.1	4.9
3.5	4.0	14.1	4.9
4.0	6.1	13.1	4.9
6.1	6.5	12.6	4.4

***

(c) Definitions related to determination of rates of tax

(1) Average account benefits ratio. For purposes of this section, the term "average account benefits ratio" means, with respect to any calendar year, the average determined by the Secretary of the account benefits ratios for the 10 most recent fiscal years ending before such calendar year. If the amount determined under the preceding sentence is not a

multiple of 0.1, such amount shall be increased to the next highest multiple of 0.1.

(2) Account benefits ratio. For purposes of this section, the term "account benefits ratio" means, with respect to any fiscal year, the amount determined by the Railroad Retirement Board by dividing the fair market value of the assets in the Railroad Retirement Account and of the National Railroad Retirement Investment Trust (and for years before 2002, the Social Security Equivalent Benefits Account) as of the close of such fiscal year by the total benefits and administrative expenses paid from the Railroad Retirement Account and the National Railroad Retirement Investment Trust during such fiscal year.

(d) Notice. No later than December 1 of each calendar year, the Secretary shall publish a notice in the Federal Register of the rates of tax determined under this section which are applicable for the following calendar year.

45 U.S.C. §231a. Annuity eligibility requirements.

(a) Individuals eligible for annuities; disability standards; proof of continued disability.

(1) The following-described individuals, if they shall have completed ten years of service (or, for purposes of paragraphs (i), (iii), and (v), five years of service, all of which accrues after December 31, 1995) and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title—

(i) individuals who have attained retirement age (as defined in section 216(l) of the Social Security Act);

(ii) individuals who have attained the age of sixty and have completed thirty years of service;

(iii) individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individuals shall be reduced by 1/180 for each of the first 36 months that he or she is under retirement age (as defined in section 216(l) of the Social Security Act) when the annuity begins to accrue and by 1/240 for each additional month that he or she is under retirement age (as defined in section 216(l) of the Social Security Act) when the annuity begins to accrue;

(iv) individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty; and

(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

****

(4) An individual who is entitled to an annuity under paragraph (v) of subdivision (1), but who does not have at least ten years of service, shall, prior to the month in which the individual attains age 62, be entitled only to an annuity amount computed under section 231b(a) of this title (without regard to section 231b(a)(2) of this title) or section 231b(f)(3) of this title. Upon attainment of age 62, such an individual may also be entitled to an annuity amount computed under section 231b(b) of this title, but such annuity amount shall be reduced for early retirement in the same manner as if the individual were entitled to an annuity under subsection (a)(1)(iii) of this section.

(b) Individuals eligible for supplemental annuities. An individual who—

(i) has attained age 60 and completed thirty years of service or attained age 65;

(ii) has completed twenty-five years of service;

(iii) is entitled to the payment of an annuity under subsection (a)(1) of this section;

(iv) had a current connection with the railroad industry at the time such annuity began to accrue; and

(v) has performed compensated service in at least one month prior to October 1, 1981;

shall, subject to the conditions set forth [in] subsections (e) and (h), be entitled to a supplemental annuity in the amount provided under section 3 of this Act: Provided, however, That in cases where an individual's annuity under subsection (a)(1) begins to accrue on other than the first day of the month, the amount of any supplemental annuity to which he is entitled for that month shall be reduced by one-thirtieth for each day with respect to which he is not entitled to an annuity under subsection (a)(1).

****

45 U.S.C. §231b. Computation of annuities

(a) Amount

(1) The annuity of an individual under section 2(a)(1) of this Act shall be in an amount equal to the amount (before any reduction on account of age and before any deductions on account of work) of the old-age insurance benefit or disability insurance benefit to which such individual would have been entitled under the Social Security Act if all of his or her service as an employee after December 31, 1936, had been included in the term "employment" as defined in that Act.

(2) For purposes of this subsection, individuals entitled to an annuity under section 2(a)(1)(ii) of

this Act shall, except for the purposes of recomputations in accordance with section 215(f) of the Social Security Act, be deemed to have attained retirement age (as defined by section 216(l) of the Social Security Act). For purposes of this subsection, individuals entitled to an annuity under paragraph (iv) or (v) of section 2(a)(1) of this Act shall be deemed to be entitled to a disability insurance benefit under section 223 of the Social Security Act.

(3) If an individual entitled to an annuity under section 2(a)(1)(i) or (iii) of this Act on the basis of less than ten years of service is entitled to a benefit under section 202(a), section 202(b), or section 202(c) of the Social Security Act which began to accrue before the annuity under section 2(a)(1)(i) or (iii) of this Act, the annuity amount provided such individual under this subsection, shall be computed as though the annuity under this Act began to accrue on the later of (A) the date on which the benefit under section 202(a), section 202(b), or section 202(c) of the Social Security Act began, or (B) the date on which the individual first met the conditions for entitlement to an age reduced annuity under this Act other than the conditions set forth in sections 2(e)(1) and 2(e)(2) of this Act and the requirement that an application be filed.

(b) Increased annuities under subsection (a)

(1) The amount of the annuity of an individual provided under subsection (a) shall be increased by an amount equal to seven-tenths of 1 per centum of the product which is obtained by multiplying such individual's "years of service" by such individual's "average monthly compensation" as determined under this subsection. The annuity amount payable to the individual under this subsection shall be reduced by 25 per centum of the annuity amount computed for such individual under subsection

(h)(1) or (h)(2), and subsection (h)(5), of this section without regard to section 7(c)(1) of this Act. An individual's "average monthly compensation" for purposes of this subsection shall be the quotient obtained by dividing by 60 such individual's total compensation for the 60 months, consecutive or otherwise, during which such individual received that individual's highest monthly compensation, except that no part of any month's compensation in excess of the maximum amount creditable for any individual for such month under subsection (j) of this section shall be recognized. In determining the months of compensation to be used for purposes of this subsection, the total compensation reported for the individual under section 9 of this Act or credited to such individual under subsection (j) of this section for a year divided by the number of months of service credited to such individual under subsection (i) of this section with respect to such year shall be considered the monthly compensation of the individual for each month of service in any year for which records of the Board do not show the amount of compensation paid to the individual on a monthly basis. If the "average monthly compensation" computed under this subsection is not a multiple of $ 1, it shall be rounded to the next lower multiple of $ 1.

(2) For purposes of subdivision (1) of this subsection, in determining "average monthly compensation" for an individual who has not engaged in employment for an employer in the 60-month period preceding the month in which such individual's annuity began to accrue, and whose major employment during such 60-month period was for a United States department or agency named in section 1(o) of this Act, the amount of compensation used with respect to each month used

in making such determination shall be the product of—

(i) the compensation credited to such individual for such month under paragraph (1) of this subsection; and

(ii) the quotient obtained by dividing—

(I) the average of total wages (as determined under section 215(b)(3)(A)(ii)(I) of the Social Security Act) for the second calendar year preceding the earliest of the year of the individual's death or the year in which an annuity begins to accrue to such individual (disregarding an annuity based on disability which is terminated because such individual has recovered from such disability if such individual engages in any regular employment after such termination); by

(II) the average of total wages (as determined under section 215(b)(3)(A)(ii)(II) of the Social Security Act) for the calendar year during which such month occurred, unless such month occurred prior to calendar year 1951, in which case, the average of total wages so determined for 1951.

In no event shall "average monthly compensation" determined for an individual under this subdivision exceed the maximum "average monthly compensation" which can be determined under subdivision (1) of this subsection for any person retiring January 1 of the year in which such individual's annuity began to accrue.

****

No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement contained in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

I. THE DECISION BELOW DEEPENS THE CONFLICT OVER RRTA TAXATION OF LOST WAGES 2

II. RESPONDENT'S FAULTY ARGUMENTS ON THE MERITS CONFIRM THAT REVIEW IS WARRANTED 5

III. THIS IS AN IDEAL VEHICLE TO ADDRESS THE EXCEPTIONALLY IMPORTANT ISSUE 11

CONCLUSION 13

Table of Authorities

Page(s)

CASES

Cheetham v. CSX Transp.,
No 06-cv-704, 2012 WL 1424168
(M.D. Fla. Feb. 13, 2012) 4

CSX Transp., Inc. v. Miller,
46 So.3d 434 (Ala. 2010) 6

Hance v. Norfolk Southern,
571 F.3d 511 (6th Cir. 2009) 1, 3, 7, 8

Jacques v. United States R.R. Retirement Bd.,
736 F.2d 34 (2d Cir. 1984) 7

Larson v. Wisconsin Central, Ltd.,
No. 10-C-446, 2012 WL 359665 (E.D.
Wis. Feb. 2, 2012) 4

Liberatore v. Monongahela Ry. Co.,
140 A.3d 16 (Pa. Sup. Ct. 2016) 8, 10

Norfolk & W. Ry. Co. v. Liepelt,
444 U.S. 490 (1980) 6

Rowan Cos. v. United States,
452 U.S. 247 (1981) 6

Soc. Sec. Bd. v. Nierotko,
327 U.S. 358 (1946) 4, 5

United States v. Quality Stores, Inc.,
134 S. Ct. 1395 (2014) 4

Windom v. Norfolk So. Ry.,
No. 10-407, 2012 WL 6096990 (M.D.
Ga. Dec. 9, 2012) 4

STATUTES

26 U.S.C. § 61 9

26 U.S.C. § 104(a)(2) 9, 10

26 U.S.C. §§ 3201, 3202(a), 3231(e) 9

26 U.S.C. § 3231(e) 1

26 U.S.C. §3231(e)(1) 7, 8

26 U.S.C. §§ 3231(e)(10) 9

CODE OF FEDERAL REGULATIONS

26 C.F.R. § 31.3231(e)-1(a)(3)-(4) 1, 5

26 C.F.R.§31.3231(e)-1(a)(4) 11

IRS GUIDANCE & DETERMINATIONS

Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL
12630 (Jan. 1961) 9

Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL
287177 (July 1985) 9

IRS Technical Advice Memorandum, 8115012; 1980 WL 137627 (Dec. 18, 1980) 6, 8, 10

REPLY BRIEF FOR PETITIONER

Petitioner BNSF has asked this Court to consider the question whether a railroad's payment to an employee for time lost from work is subject to tax under the Railroad Retirement Tax Act. The Act defines taxable compensation as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e). The Internal Revenue Service has interpreted the statutory language to include "amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . . as well as pay for time lost." 26 C.F.R. § 31.3231(e)-1(a)(3)-(4). The Eighth Circuit acknowledged that "[u]nder this regulation, damages for lost wages fit within the definition of 'compensation.'" (App. 19a.) However, the Eighth Circuit found that "the RRTA is unambiguous" and rejected the IRS's interpretation. (App. 24a.)

BNSF's petition demonstrated that the Eighth Circuit's decision conflicts with the decision of the Sixth Circuit in *Hance v. Norfolk Southern*, 571 F.3d 511 (6th Cir. 2009), and that three state supreme courts within the Eighth Circuit have also reached decisions that conflict with each other on the same point. (Pet. 2-3, 20-21.) This conflict places BNSF and other railroads in an untenable position: tax liabilities are different in state and federal courts in the same geographic location. As Respondent recognizes, the tax liability can be significant. (Opp. 16.) This differential tax treatment opens the door to forum-shopping. The railroad industry has a significant interest in the uniform administration of

these federal tax laws. Only this Court can resolve this multi-faceted division of authority.

I. The Decision Below Deepens The Conflict Over RRTA Taxation Of Lost Wages

Respondent does not dispute that the Eighth Circuit's decision enhances a conflict among the appellate courts. He acknowledges that "four State courts have reached different conclusions on RRTA taxation of FELA judgments ...." (Opp. 7.) On one side are the Supreme Court of Nebraska, the Supreme Court of Iowa, and the Pennsylvania intermediate court. As Respondent admits, these three courts "concluded that FELA judgments are taxable" under the RRTA. (Opp. 8.) The fourth court is the "Missouri Supreme Court, which concluded FELA judgments are not taxable." (Opp. 7.) The Eighth Circuit similarly held that damages for lost wages are not taxable. (App. 24a.) Respondent agrees that "the question of whether FELA satisfactions are subject to RRTA taxes is certainly important ...." (Opp. 7.)

In light of these admissions, it appears that all parties agree that the criteria for this Court's review are present in this case. There is a conflict involving a federal circuit court and the highest courts of three States on an important matter. *See* Rule 10(a). The Association of American Railroads explains that the issue presented "has implications beyond FELA time lost awards." (AAR Amicus Br. 3) The Eighth Circuit's reasoning creates serious doubt as to the taxability of other forms of time-lost payments such as severance pay, vacation pay, holiday pay, and sick

pay. In 2016 alone, the railroads paid out at least $1.9 billion in such benefits, which were subject to railroad retirement taxes. (*Id.* at 12.) Respondent does not disagree.

Respondent nevertheless contends that the Court should deny review because the Missouri Supreme Court's reasoning "is more thorough ...." (Opp. 7.) This statement simply reflects Respondent's skewed view of the merits, not a dissolution of the conflict. Courts in Nebraska and Iowa remain bound by those rulings of their state supreme courts. Review by this Court is needed to resolve the conflict in the courts on this important issue.

The decision below also creates a conflict among the federal circuit courts. The Sixth Circuit held that the railroad "will be required to report and pay" employment taxes on that award because the RRTA and its accompanying regulations cover "all 'compensation' to employees, including payment 'for time lost.'" *Hance*, 571 F.3d at 523. The Eighth Circuit reached the opposite conclusion and held that time-lost damages are not taxable under the RRTA. (App. 24a.) Respondent tries to avoid the circuit conflict by reframing the issue presented, limiting its scope to FELA awards. (Opp. i, 6.) But the specific claim underlying the award of lost wages –the FELA claim – had no bearing on the Eighth Circuit's resolution of the legal issue. (App. 20a-24a.) And despite Respondent's contrary contention (Opp. 6-7),

the federal district courts are also divided on this issue.[1]

The petition also pointed out that the reasoning of the Eighth Circuit – that the "plain text" of the RRTA refers only to "services that an employee actually renders" (App. 20a) – was inconsistent with the reasoning of two of this Court's opinions. Pet. 25-26, *citing Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014)). Respondent points to immaterial factual distinctions in those cases but does not dispute the legal principle established by them:

> We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which

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[1] *See Larson v. Wisconsin Central, Ltd.*, No. 10-C-446, 2012 WL 359665, at *2 (E.D. Wis. Feb. 2, 2012) ("The employer railroad must withhold applicable Tier 1 and Tier 2 taxes and the employee's Medicare tax obligations from payment of any judgment."); *Cheetham v. CSX Transp.*, No 06-cv-704, 2012 WL 1424168 (M.D. Fla. Feb. 13, 2012) (awards for lost wages under the Family Medical Leave Act are subject to withholding under the RRTA); *see also Windom v. Norfolk So. Ry.*, No. 10-407, 2012 WL 6096990, at *2 (M.D. Ga. Dec. 9, 2012) (stating that the railroad "might have a plausible argument for a set off" if it could show that it paid or would have to pay the taxes).

> compensation is paid to the employee by the employer.

Nierotko, 327 U.S. at 365-66. Thus, the reasoning of the Eighth Circuit's opinion, with its narrow focus on the performance of actual services in determining whether "compensation" was received, is contrary to this Court's precedent.

II. Respondent's Faulty Arguments on the Merits Confirm that Review is Warranted

Perhaps most telling in Respondent's opposition brief is what it does not do: defend the court of appeals' decision on its own terms. The Eighth Circuit held that "damages for lost wages did not fit within the plain meaning of the RRTA." (App. 20a.) Conspicuously absent from the opposition brief is any defense of the Eighth Circuit's holding or actual reasoning. Instead, Respondent offers a series of rationales that no court has ever accepted despite the significant body of case law that has accumulated in this area. In fact, many of the arguments raised in the opposition brief were either not raised by Respondent in the litigation below or were rejected by the Eighth Circuit. Respondent's failure to defend the rationale of the decision below is a sign that certiorari is warranted.

For example, Respondent claims that "the IRS itself" has never "issued any regulation or guidance" on this issue. (Opp. 9.) He is wrong on both counts. The IRS's regulation defines compensation to include "pay for time lost." 26 C.F.R. § 31.3231(e)-1(a)(3)-(4). As the Eighth Circuit explained in this case, damages for lost wages "fit well within" the scope of

this regulation. (App. 19a.) Moreover, in a 1980 Technical Advice Memorandum, the IRS set forth its position that the railroad was required to withhold RRTA taxes from lost damages awarded in a FELA case.[2] The IRS concluded: "We therefore believe the payment received by the [railroad] employee for loss of earnings can reasonably be described as compensation for time lost and comes within the definition of compensation for RRTA purposes." IRS Technical Advice Memorandum, 1980 WL 137627. Thus, the IRS has issued both a regulation and additional guidance on the question presented here.

Respondent also argues that juries typically award in FELA cases only net, take-home wages. (Opp. 15.) The case that he cites – *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) – deals only with federal *income* taxes. RRTA taxes are separate taxes and fundamentally different than federal income taxes. *See CSX Transp., Inc. v. Miller*, 46 So.3d 434, 460 (Ala. 2010). Thus, the jury's instruction in this case was specifically limited to *income* taxes: "The Respondent will not be required to pay any federal or state income taxes on an amount that you award." (Dist. Ct. ECF No. 125 at 24.) There is no basis to conclude that the jury deducted RRTA taxes from the

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[2] *See* IRS Technical Advice Memorandum (TAM) 8115012; 1980 WL 137627 (Dec. 18, 1980). While TAMs have no precedential force, they are a useful as an indication of the IRS's position and may be viewed as substantial authority by a court. *See, e.g., Rowan Cos. v. United States*, 452 U.S. 247, 262 n.17 (1981).

award in this case. The jury awarded $30,000 in past lost wages for a 5-month period in 2011. This amount was *more than* Respondent's net wages *the entire year* in 2010. Thus, Respondent never claimed in the litigation below – either in the post-trial papers or in the Eighth Circuit – that the jury had already deducted RRTA taxes from its award of lost wages.

Respondent asserts for the first time in his opposition brief that no RRTA taxes are owed because he was "not a BNSF employee when BNSF partially satisfied the judgment." (Opp. 6.) This is immaterial. There is no requirement that the employment relationship still exist at the time the judgment is entered or the payment is made. *See* 26 U.S.C. §3231(e)(1); *Jacques v. United States R.R. Retirement Bd.*, 736 F.2d 34, 39-41 (2d Cir. 1984). It is undisputed that the jury awarded lost damages to Respondent for the period of time in which he *was* employed by BNSF – December 19, 2010 to May 16, 2011. (App. 4a.)

Respondent emphasizes that the employee should be able to decide whether his award for lost damages gets taxed. (Opp. 15.) Under the RRTA, however, the employee does not unilaterally control the imposition of employment taxes. The railroad is required to withhold taxes on "all 'compensation' to employees" – regardless of whether the employee asks for the retirement benefits. *Hance*, 571 F.3d at

523; 26 U.S.C. §3231(e)(1).[3] The IRS rejected a similar argument in the 1980 Technical Advice Memorandum. *TAM*, 1980 WL 137627 (explaining that, once the jury awarded a specific amount of lost wages, the employee cannot later try to apportion the amounts differently). The RRTA's legislative history shows that the employee union's representative was aware that taxes would be imposed on "pay for time lost" but favored this definition anyway because it would "increase the creditable months of service of railroad workers."[4] Giving the same meaning to "compensation" under the RRTA and the RRA provides harmony and stability by ensuring adequate funding for the very retirement benefits the employees will receive. *See Hance v. Norfolk S. Ry. Co.*, 571 F.3d at 542; *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29-30 (Pa. Sup. Ct. 2016).

Respondent seeks to discourage certiorari by mentioning a statutory provision that the court of appeals did *not* invoke. He argues that, even if lost damages fit within the definition of compensation,

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[3] When BNSF reported the payment of lost wages in this case to the federal agencies, the Railroad Retirement Board gave Respondent additional credit towards his retirement benefits. (Dist. Ct. ECF No. 162 at 9.)

[4] *Railroad Retirement, Hearings on S. 293 before the Senate Committee on Interstate Commerce*, 79th Cong. 1st Sess. at 390 (July 23-26, 1945) (Statement by Murray W. Latimer on behalf of the Railway Labor Executives Association).

they are excludable under 26 U.S.C. § 104(a)(2). (Opp. 13.) This is incorrect. Section 104 provides an *income* tax exclusion. It creates an exemption for personal injury awards from "gross income," which is used in computing income tax. 26 U.S.C. § 61. It thus pertains to a different statutory definition ("gross income") for purposes of a different tax (income tax). The exclusion in Section 104(a) is not part of the RRTA. Railroad retirement taxes are based on "compensation" as that term is defined in the RRTA. 26 U.S.C. §§ 3201, 3202(a), 3231(e).[5]

The IRS has consistently recognized that federal income taxes and RRTA taxes apply differently to personal jury awards. It held in two Revenue Rulings that the exemption in Section 104 has no bearing on the RRTA tax treatment for time lost.[6] It

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[5] When Congress wanted to incorporate exclusions from income taxes into the RRTA and thereby make them exclusions from RRTA taxes, it did so expressly. *See, e.g.*, 26 U.S.C. §§ 3231(e)(10) – (11). However, Congress did not designate Section 104 as an exclusion that would apply to the RRTA's definition of compensation.

[6] *See* Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961) ("The fact that in this case 'time lost payments' constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for Federal income tax purposes."); Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985) (explaining that Revenue Ruling 61-1 "states that the fact that the 'time lost payments' constituted compensation for purposes of the taxes imposed by the Railroad Retirement

(Continued ...)

also held in a Technical Advice Memorandum that Section 104 exempts a FELA award for lost wages from federal income taxes but that it does *not* exempt that same award from RRTA taxes. *TAM*, 1980 WL 137627. Thus, the IRS's consistent and longstanding views on this issue would be entitled to deference. *See Liberatore v. Monongahela Ry. Co.*, 140 A.3d at 29-30.

Railroad retirement taxes are significant to railroads and their employees. Here, for example, the amount of RRTA taxes owed by Respondent in each year from 2005 to 2012 was *greater* than the amount of federal taxes withheld. And this is just a start. As Respondent acknowledges, "While in this case Loos would suffer a discount of only $3,765, in cases with larger damages awards the consequences are more severe. *Loy*, for example, concerned a $29,247.25 tax liability." (Opp. 16.) This is more than enough to provide an incentive for forum-shopping and certainly enough to be perceived as unfair discrimination between taxpayers in different fora.

In short, review is warranted. The parade of empty merits arguments in the opposition brief only highlights the problematic nature of the Eighth Circuit's decision and the need for a definitive resolution.

Tax Act does not preclude the application of the exclusion from gross income under section 104(a)(2)").

III. This Is An Ideal Vehicle To Address the Exceptionally Important Issue

This case is the ideal vehicle to resolve the conflict for three reasons. First, the factual predicate is clear: a special verdict confirms the exact amount of pay for time lost. Respondent seeks to raise questions about whether he "request[ed]" an award. (Opp. 10.) It is not apparent why a request is necessary, but it is clear that Respondent asked a jury to award him with pay for lost time, and the jury did so.

Second, the legal predicate is clear. The IRS regulation defines compensation as including "pay for time lost." 26 C.F.R.§31.3231(e)-1(a)(4) (App. 46a-47a.) Respondent points out that an additional regulation elaborating on "items included as compensation" stated that it included "a payment . . . made to an employee with respect to a personal injury." (Opp. 9.) But there is nothing indicating that the deletion of this example was intended to narrow the scope of the IRS regulation, which on its face continues to include amounts paid to an employee that is absent from active service.

Third, the agency position is clear. The Eighth Circuit, in its opinion in this case, acknowledged that this judgment fell within the agency regulation: "Under this regulation, damages for lost wages fit well within the definition of 'compensation.'" App. 19a. The IRS has repeatedly filed amicus briefs confirming that FELA judgments reflecting damages for time lost fall within the regulation. (Pet. 32 n.13.)

The Railroad Retirement Board has made the same point. The publication cited by respondent (Opp. 14 n.8) says: "The employee's portion of the railroad retirement tax liability is usually withheld from the gross amount of the award." *Railroad Retirement Service Credits and Pay for Time Lost* (May 2008). Another publication available on the Railroad Retirement Board website, explains: "Examples of pay for time lost include . . . [a] personal injury award or settlement which allocates a portion of the damages as lost wages for a specific period following the date of the injury." Form IB-4 (03-17) Pay for Time Lost from Regular Railroad Employment at 4 (available at https://www.rrb.gov/Benefits/IB-4). It contains an entire section entitled, "HOW IS PAY FOR TIME LOST ALLOCATED WHEN THERE IS A COURT ORDERED JUDGMENT?" *Id.* at 9. There is no doubt that the agency regulations and guidance on pay for time lost apply to "satisfactions of judgments" as well as to settlements.

This Court should end the endless battles in the federal and state courts over the taxation of FELA and other pay-for-time-lost awards.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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April 2018

No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

17-1042

BNSF RAILWAY COMPANY,

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v.

MICHAEL D. LOOS,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed pursuant to Rule 37.2(b). As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Petitioner has consented to AAR's filing of a brief.[1] Respondent has not consented.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and

[1] The letter expressing consent has been filed with the Clerk of the Court.

commuter authorities. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole, and in those instances such requests have been granted.[2]

This case involves the interplay between two federal statutes that are unique to the railroad industry: the Federal Employers' Liability Act (FELA) and the Railroad Retirement Tax Act (RRTA). Each year, railroads are defendants in hundreds of lawsuits filed under FELA, a federal negligence statute that takes the place of workers' compensation in the railroad industry. Railroads also pay a significant amount of taxes each year under the RRTA, a statute which funds benefits paid to railroad retirees, their spouses and survivors under the railroad retirement system.

AAR works closely with its member railroads on a host of issues arising under FELA. AAR also works closely with its members and the Railroad Retirement Board—the federal agency that administers the railroad retirement system—on tax matters arising under the RRTA. Therefore, AAR is in a position to provide the Court with a broad, industry-wide perspective on the issue before the Court. AAR's purpose in filing a brief is to demonstrate how the issue before the Court impacts, not just to Petitioner, but railroads nationwide, and why it is important to the entire railroad industry that this Court provide guidance on this issue.

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[2] *E.g.*, *Bolen v. BNSF Ry.*, 136 S. Ct. 1660 (2016); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007).

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE UNCERTAINTY CREATED BY THE DECISION BELOW AND OTHER LOWER COURT DECISIONS ABOUT THE APPLICATION OF TWO IMPORTANT FEDERAL STATUTES REQUIRES GUIDANCE FROM THIS COURT	3
A. Railroad Workers Who Are Injured on the Job May Collect Damages for Lost Wages Under the Federal Employers' Liability Act	4
B. Railroad Employees are Eligible for Railroad Retirement Benefits Which are Funded by Payroll Taxes Levied on Their Compensation Under the RRTA	5
C. Lower Courts are Split Over Whether Time Lost FELA Awards are Subject to RRTA Payroll Taxes	8
D. The Split Among the Lower Courts Means that When a Time Lost FELA Award is Made, the Applicability of the RRTA Depends on the Jurisdiction Where the FELA Suit is Brought	10

TABLE OF CONTENTS—Continued

Page

E. The Split Among the Lower Courts Raises Questions About the Taxability of Other Payments that are Made to Railroad Employees for Periods When They Did Not Render Services 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	Page(s)
Brady v. Southern Ry. Co., 320 U.S. 476 (1943)	13
Frazier v. Norfolk & W. Ry. Co., 996 F.2d 922 (7th Cir. 1993)	4
Heckman v. Burlington N. Santa Fe Ry. Co., 837 N.W.2d 532 (Neb. 2013)	10
Liberatore v. Monongahela Ry. Co., 140 A.3d 16 (Pa. Super 2016)	10
Mickey v. BNSF Ry. Co., 437 S.W.3d 207 (Mo. 2014)	8, 9, 10
Munoz v. Norfolk S. Ry. Co., No. 1-17-1009 (Ill. App.)	11
New Orleans & N. E. R.R., 247 U.S. 367 (1918)	4
N.Y. Cent. R.R. v. Winfield, 244 U.S. 147 (1917)	13
Norfolk S. Ry. Co. v. Williams, No. 2160823 (Ala. App.)	11
Phillips v. Chicago Cent. & Pac. R.R., 853 N.W.2d 636 (Iowa 2014)	9
Southern Ry. Co. v. Gray, 241 U.S. 333 (1916)	4
Thor Power Tool Co. v. Comm'r, 439 U.S. 522 (1979)	13

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS	Page(s)
26 U.S.C. §§3101 *et seq*	9
26 U.S.C. §3201(a) & (b)	6
26 U.S.C. §§3201-3241	1
26 U.S.C. §3202(a)	7
26 U.S.C. §3202(b)	7
26 U.S.C. §3221(a) & (b)	6
26 U.S.C. §3231(e)(1)	7
45 U.S.C. §§51-60	1
45 U.S.C. §51	4
45 U.S.C. §56	4
45 U.S.C. §231-231v	1
45 U.S.C. §231(f)(1)	9
45 U.S.C. §231(h)(1)&(2)	9
45 U.S.C. §231a(a)(1)	9
45 U.S.C. §231a(a)(1)(ii)	6
45 U.S.C. §231(a)(1)(iv)	6
45 U.S. C. §231a(b)	9
46 U.S.C. §30104	4
20 C.F.R. §210.5(d)	9
20 C.F.R. §211.2(b)(2)	9
20 C.F.R. §211.3(a)	9
26 C.F.R. §31.3202-1(a)	7
26 C.F.R. §31.3202-1(e)	7
26 C.F.R. §31.3231(e)-1(a)(3)-(4)	7

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

General Accounting Office, *Federal Employers' Liability Act: Issues Associated with Changing How Railroad Work-Related Injuries Are Compensated* (1996) 4

R.R. Ret. Bd., *2017 Annual Report* 6

R.R. Ret. Bd., *Pay for Time Lost from Regular Railroad Employment*, Form 1B-4, (06-95) 7

R.R. Ret. Bd., *Railroad Retirement Handbook* (2015) 5, 6, 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities.[1] AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR seeks to participate as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the rail industry as a whole.

This case meets the criterion for AAR *amicus* participation because there is a conflict among lower courts that affects two federal statutes that apply uniquely to the railroad industry: the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60; and the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241. These statutes affect all railroads, and involve the expenditure of significant sums of money: the payment of hundreds of millions of dollars in settlements and verdicts under FELA, the payment of billions of dollars in taxes under the RRTA, and the billions of dollars in benefits provided under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v.

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[1] AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

AAR works closely with its members to ensure consistent and correct application of FELA around the country. Similarly, AAR works with its members and the Railroad Retirement Board—an independent agency in the executive branch of the federal government charged with administering the RRA—to ensure that the railroad retirement system is administered in an equitable and efficient manner, and in accordance with the requirements of the law.

SUMMARY OF THE ARGUMENT

This case presents the question of whether certain damage awards made under FELA are subject to payroll taxes levied under the RRTA. Under FELA, railroad employees who are injured on the job can seek damages from their employer for, among other things, wage loss suffered when they miss time from work due to the injury (so called "time lost" awards). Railroad employees also are eligible for retirement and other benefits under the RRA. These benefits are funded by RRTA payroll taxes levied on the compensation paid by railroad employers and received by railroad employees. When an employee collects a time lost award under FELA, the Internal Revenue Service considers that payment to be compensation and requires railroads to collect and pay both the employer and employee shares of the RRTA payroll taxes.

Notwithstanding the Government's position, there is a split among lower courts over whether RRTA taxes are applicable to FELA time lost awards. The court below held they are not, because FELA time lost awards do not meet the RRTA definition of compensation, which is "any form of money remuneration paid to an individual for services rendered as an employee to one of more employers." The court held that because FELA time lost awards are made for periods when the

employee was not working, they are not in payment for services rendered. The Missouri Supreme Court also has held that FELA time lost awards are not subject to RRTA payroll taxes. The Supreme Courts of Iowa and Nebraska, and a Pennsylvania intermediate appellate court, have held they are.

As a result, many railroads are now subject to irreconcilably inconsistent rulings in states where they operate. This split is likely to widen, as the issue is now pending in appellate courts in two states where multiple large railroads operate.

This issue has implications beyond FELA time lost awards. If FELA time lost awards are not subject to RRTA taxes because they are payments for time periods during which services were not actually rendered, the same logic might call into question whether other payments to employees for time periods during which services were not rendered—like vacation, holiday, and sick pay—are subject to RRTA taxes. In 2016, such payments amounted to about $1.9 billion, a sum that dwarfs FELA time lost awards.

ARGUMENT

I. THE UNCERTAINTY CREATED BY THE DECISION BELOW AND OTHER LOWER COURT DECISIONS ABOUT THE APPLICATION OF TWO IMPORTANT FEDERAL STATUTES REQUIRES GUIDANCE FROM THIS COURT.

This case concerns the interplay between two federal statutes that are unique to the railroad industry: FELA and the RRTA. FELA is a federal negligence law which provides compensation to employees who are injured on the job. The RRTA levies taxes that fund benefits under the RRA, a statute which created and

governs the retirement security system that applies only to railroad employees.

A. Railroad Workers Who Are Injured on the Job May Collect Damages for Lost Wages Under the Federal Employers' Liability Act.

FELA was enacted over a century ago, predating the modern no-fault workers' compensation laws which became universal for the rest of U.S. industry in the decades after FELA's enactment. *See* General Accounting Office, *Federal Employers' Liability Act: Issues Associated with Changing How Railroad Work-Related Injuries Are Compensated* 15 (1996).[2] Congress incorporated into FELA the concept of common law negligence as the basis for recovery. 45 U.S.C. §51; *New Orleans & N. E. R.R.*, 247 U.S. 367, 371 (1918) ("negligence is essential to recovery"); *Southern Ry. Co. v. Gray*, 241 U.S. 333, 339 (1916) (The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery.").

When a railroad employee is injured on the job, unless the parties can reach a settlement the employee must bring a lawsuit in state or federal court in order to recover. 45 U.S.C. §56 (granting state and federal courts concurrent jurisdiction in FELA cases). In these FELA lawsuits, injured workers may seek both economic and noneconomic damages. *See Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925 (7th Cir. 1993).

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[2] The maritime industry, by virtue of the Jones Act, also is covered by the FELA. 46 U.S.C. §30104. Virtually all other employers and employees in the United States are covered by a state or federal no-fault workers' compensation law.

Damage claims for past and future lost wages [illegible] are a major component of a FELA suit. During the past three years, railroads reported to the Federal Railroad Administration an annual average of 2,863 on-duty injuries resulting in time away from the job. http://safetydata.fra.gov/OfficeofSafety/publicsite/Query/casemp.aspx (data for 2017 includes only the first eleven months of the year). Not surprisingly, many of the hundreds of FELA suits filed against railroads each year seek recovery for wage loss incurred when the employee was unable to work due to the injury. In cases where damage awards for time lost are made, conflicting decisions among several courts, including the court below, have created confusion over whether those awards are subject to payroll taxes levied under the RRTA.

B. Railroad Employees are Eligible for Railroad Retirement Benefits Which are Funded by Payroll Taxes Levied on Their Compensation Under the RRTA.

Railroads and their employees are not covered by the Social Security system that covers virtually all other employers and employees (and self-employed individuals) in the United States. Instead, they are covered by the RRA, a retirement security system that was enacted around the same time as Social Security. *See* R.R. Ret. Bd., *Railroad Retirement Handbook* 1-2 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015%29.pdf). The RRA provides retirement and disability benefits to railroad workers, their spouses and survivors.

The RRA provides two tiers of benefits: tier I benefits are essentially equivalent to benefits provided under the Social Security system, but are based on railroad retirement age and service requirements; tier

II provides additional retirement benefits, above and beyond what Social Security provides, that are comparable to private multiemployer pension plans. Tier II also provides other benefits not available under Social Security. *See e.g.*, 45 U.S.C. §231a(a)(1)(iv) (providing an occupational disability benefit); *see generally Railroad Retirement Handbook*, at 15-20. Eligibility requirements under the RRA differ from Social Security, and in some cases are more favorable to long–term railroad employees. *See e.g.*, 45 U.S.C. §231a(a)(1)(ii) (permitting workers aged 60 with at least 30 years of service to retire with an unreduced benefit).

The substantial sums paid in railroad retirement benefits each year require a reliable funding source. At the end of fiscal 2016, 222,100 age and disability annuities, 145,900 spousal annuities, and 116,800 survivor annuities were being paid. R.R. Ret. Bd., *2017 Annual Report* 4 (available at https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf). In fiscal year 2016, about $12.3 billion in retirement benefits was paid to those beneficiaries. *Id.* at 1, 15. Payroll taxes levied under the RRTA are the primary source of funding of these benefits, *Railroad Retirement Handbook,* at 45, accounting for $5.9 billion in 2016. *2017 Annual Report,* at 11.

The RRTA imposes separate payroll taxes on "compensation" paid by railroad employers and received by railroad employees to fund each tier of benefits. 26 U.S.C. §3201(a) & (b) (imposing tier I and tier II payroll tax on compensation received by employees); 26 U.S.C. §3221(a) & (b) (imposing tier I and tier II payroll tax on compensation paid by employers). Compensation is defined as "any form of money remuneration paid to an individual for services

rendered as an employee to one of more employers." 26 U.S.C. §3231(e)(1).

Tier I taxes are the equivalent of the Social Security payroll taxes and fund Social Security-equivalent benefits (as well as Medicare). Tier II payroll taxes fund the benefits that are available to railroad employees but not to Social Security beneficiaries. Tier II taxes have a different earnings base (the maximum amount of earnings that is subject to the tax each year) than tier I taxes, and utilize a different rate for employees and employers, which can fluctuate year to year based on the "average account benefit ratio"—a ratio of fund assets to benefits and expenses. *Railroad Retirement Handbook,* at 46.

The RRTA requires that railroad employers collect the taxes owed by their employees by deducting the proper amounts from the employee's compensation and paying those amounts to the IRS. 26 U.S.C. §3202(a); 26 C.F.R. §31.3202-1(a). The law is clear that the employer has an absolute obligation to pay the taxes to the IRS and not to anyone else. 26 U.S.C. §3202(b); 26 C.F.R. §31.3202-1(e).

The RRB's position is that that obligation applies to pay for time lost. "All compensation under the Railroad Retirement Tax Act (RRTA) is subject to the Tier I and Tier II tax rates . . . This is also true of pay for time lost." R.R. Ret. Bd., *Pay for Time Lost from Regular Railroad Employment*, Form 1B-4, at 8 (06-95). The RRB explains that "[p]ay for time lost is compensation paid by a railroad employer which is creditable under the [RRA] and which is attributable to lost earnings for an identifiable period of absence from active service." *Id.* at 1. In addition, Treasury regulations interpret compensation under the RRTA to include time lost payments. 26 C.F.R. §31.3231(e)-

1(a)(3)-(4).[3] Thus, both the IRS and RRB take the position that time lost payments constitute compensation for the purpose of both calculating benefits and levying taxes, and that railroads must pay RRTA payroll taxes on time lost payments made to employees, including awards made under FELA. *See* Pet. at 6-7.

C. Lower Courts are Split Over Whether Time Lost FELA Awards are Subject to RRTA Payroll Taxes.

While the position of the Government is clear, as Petitioner points out, lower courts are split on the question whether RRTA taxes are owed on time lost awards made under FELA. Pet. at 14-20. The court below held that RRTA taxes are not owed on such awards. Pet. App. 17a – 24a. The Missouri Supreme Court has also so ruled. *Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207 (Mo. 2014).

The reasoning of the court below was that time lost FELA awards are not subject to RRTA taxes because they are not remuneration "for services rendered." Pet. App. 20a. The court reasoned that a time lost award is made for "a period of time during which the employee did not actually render any services." *Id.*

Both the court below and the Missouri Supreme Court in *Mickey* held that FELA awards are not subject to RRTA payroll taxes despite the fact that a time lost award received by an employee is included in the calculation of, and thus will increase, the

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[3] The regulation states that "[t]he term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from active service of the employer . . . ."

employee's RRA benefits—the very benefits that are funded by the RRTA. Time lost awards made to an employee are included in the calculation of that employee's railroad retirement benefits—both for creditable compensation and creditable months of service.[4] Nonetheless, both the *Mickey* court and the court below refused to acknowledge the connection between the benefits paid and the taxes levied to fund those benefits. *Id.* 437 S.W.3d at 214-15.[5] Pet. App. 21a.

In contrast, other courts have recognized the connection between the RRTA and RRA, and the relevance of that connection to the taxability of time lost payments. The Iowa Supreme Court concluded that the RRA and RRTA are "inextricably interconnected because the latter funds the former" and that it is "logical to read these two statutes in harmony to conclude that compensation as used in the RRTA implicitly includes time lost." *Phillips v. Chicago Cent. & Pac. R.R.*, 853 N.W.2d 636, 649 (Iowa 2014). *See also Heckman v.*

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[4] *See* 45 U.S. C. §231a(a)(1) (describing eligibility for both retirement and disability benefits); 45 U.S. C. §231a(b) (describing eligibility for supplemental retirement benefits). "Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service," 20 C.F.R. §210.5(d), and is considered "creditable compensation." 20 C.F.R. §211.3(a). Thus, for the purpose of calculating the benefits for which a railroad worker will become eligible, payment received for time lost (including pay received due to a personal injury) is included in determining both the employee's "years of service," 45 U.S.C. §231(f)(1), and "compensation." 45 U.S.C. §231(h)(1)&(2); 20 C.F.R. §211.2(b)(2).

[5] *Mickey* also reasoned that time lost awards are not subject to RRTA taxes because personal injury awards are not subject to federal income taxes, or to payroll taxes under the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*, the statute which funds Social Security benefits. 437 S.W.3d at 212.

Burlington N. Santa Fe Ry, Co., 837 N.W.2d 532, 540 (Neb. 2013) ("Based on the definition of compensation as stated in the RRA and RRTA and the agencies' interpretations found in federal regulations, we conclude that time lost is compensation that is subject to taxation.").

More recently, the Pennsylvania Superior Court has rejected *Mickey*'s view that the calculation of benefits under the RRA has no bearing on the taxation of compensation under the RRTA. *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29 (Pa. Super 2016) ("Although the *Mickey* Court attempted to disassociate the RRA and RRTA, we find the statutes are inextricably intertwined, and must be considered *in pari materia*. Indeed, without the benefits provided for in the RRA, there would be no need for the taxing provisions of the RRTA.").

D. The Split Among the Lower Courts Means that When a Time Lost FELA Award is Made, the Applicability of the RRTA Depends on the Jurisdiction Where the FELA Suit is Brought.

The *Phillips*, *Heckman* and *Liberatore* courts agree with the position of the IRS and RRB that time lost payments constitute compensation for the purpose both of calculating benefits and levying taxes. The court below and the *Mickey* court reject the Government's position. Railroads are caught in the middle.

The split of authority puts railroads in a difficult position. Each year the largest railroads pay substantial sums to injured employees under FELA. When these payments include awards for time lost, the Government requires the railroad to collect and pay amounts to cover both the employer and employee

portion of the payroll taxes on those awards. FELA plaintiffs typically oppose the railroad making such deductions and payments. Currently, resolution of these disputes depends on the jurisdiction where the suit was filed.

This problem is particularly acute in the Eighth Circuit. There is a split among the highest courts of three states within the Eighth Circuit. And, with the decision below, the Court of Appeals now agrees with one of those courts and is in conflict with the other two. As a result, different results would obtain on this issue in federal courts in the Eighth Circuit on the one hand, and in at least two states within that circuit on the other. As the petition explains, BNSF, which operates throughout the Eighth Circuit, directly faces this conflict. *See* Pet. at 21.

The Union Pacific Railroad, another large freight railroad, also operates throughout the Eighth Circuit, including in the three Eighth Circuit states that have addressed this issue. Two other large freight railroads operate in both Iowa and Missouri. Amtrak, which operates intercity passenger rail service in 46 states, including Missouri, Iowa and Nebraska, is covered by FELA and the railroad retirement system. These railroads all face the same untenable situation as BNSF.

The problem is not confined to one region of the country or a few railroads. This issue is pending before appellate courts in Illinois, *Munoz v. Norfolk S. Ry. Co.*, No. 1-17-1009 (Ill. App.), and Alabama. *Norfolk S. Ry. Co. v. Williams*, No. 2160823 (Ala. App.). Multiple large railroads operate in those states; the two largest eastern railroads, Norfolk Southern and CSX Transportation, operate in those states as well as Pennsylvania and Missouri. Regardless of how those

pending appeals are resolved, eastern railroads will also face conflicts in the states where they operate.

E. The Split Among the Lower Courts Raises Questions About the Taxability of Other Payments that are Made to Railroad Employees for Periods When They Did Not Render Services.

The uncertainty created by the split among lower courts has implications that go beyond the tax treatment of time lost awards under FELA. The court below held that time lost FELA awards are not subject to RRTA taxes because they are not made for a period of time when the employee actually rendered services to the employer. Pet. App. 20a. Time lost FELA awards are not the only payments made to railroad employees for time periods when services were not rendered.

Data reported by the largest railroads to the Surface Transportation Board show that in 2016 railroad employees were paid over $1.9 billion in vacation, holiday, and sick pay (and pay for other periods when the employee did not perform services) (available at https://www.stb.gov/econdata.nsf/dc81d49e325f550a852566210062addf?OpenView). This amount—which greatly exceeds the amounts awarded each year as pay for time lost under FELA—also represents payments made to employees for time during which they did not actually perform services. If FELA time lost awards are not subject to RRTA taxes because they are payments for time periods during which services were not actually rendered, there is no logical reason why other payments for time periods during which services were not rendered—like vacation, holiday, and sick pay—also would not be taxable. At very least, the decision below raises the question whether large sums of money regularly paid to railroad employees are

subject to RRTA taxes. Many millions of dollars in payroll taxes would be at stake if these kinds of payments were not subject to RRTA taxes.

The divergent positions taken by the lower courts leave uncertainty in two areas of law that this Court has long admonished require uniformity. First, taxing statutes require uniform interpretations. Otherwise, similarly situated taxpayers would be obligated to pay different amounts on the same kind of income, or otherwise be treated differently on tax matters. *See Thor Power Tool Co. v. Comm'r,* 439 U.S. 522, 544 (1979).

FELA also demands uniform interpretation. Congress' very purpose in enacting FELA was to subject railroads and their employees to "a national law having a uniform operation throughout all the states," by fixing "one rule in all the states" regarding railroad "employer's liability for personal injuries." *N.Y. Cent. R.R. v. Winfield,* 244 U.S. 147, 150 (1917). *See also Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943) (explaining the need for "a uniform federal rule" so that all litigants "receive similar treatment in all states"). Until resolved, the split among the lower courts, which is only likely to grow wider, will result in FELA plaintiffs in different jurisdictions who receive the same award, having different tax liability, and, therefore, taking home different amounts.

For these reasons, AAR supports BNSF's petition seeking "definitive guidance . . . on the validity of the IRS's interpretation that the pay for time lost is subject to employment taxes under the RRTA." Pet. at 4. Only this Court can provide this much-needed guidance.

CONCLUSION

For the foregoing reason the petition should be granted.

Respectfully submitted,

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February 26, 2018

No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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TABLE OF APPENDICES

Page

APPENDIX A — RELEVANT DOCKET ENTRIES 1a

APPENDIX B — PARTIAL SATISFACTION OF JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FILED FEBRUARY 29, 2016 ..... 18a

APPENDIX C – DECLARATION OF MICHAEL P. MCREYNOLDS IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR COLLATERAL SOURCE OFFSETS, FILED NOVEMBER 4, 2015 ..... 26a

APPENDIX D — INSTRUCTIONS FOR IRS FORM CT-1, EMPLOYER'S ANNUAL RAILROAD RETIREMENT TAX RETURN .. 29a

APPENDIX E — RAILROAD RETIREMENT INFORMATION PAMPHLET, DATED MAY 2008 ..... 64a

APPENDIX F — PAY FOR TIME LOST FROM REGULAR RAILROAD EMPLOYMENT, PAMPHLET, FILED OCTOBER 21, 2015 ..... 70a

Table of Appendices

Page

APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FILED SEPTEMBER 17, 2015 ..... 86a

APPENDIX H — JURY INSTRUCTION NO. 18, DAMAGES: INJURY TO EMPLOYEE, FILED SEPTEMBER 15, 2015 ..... 89a

APPENDIX I — JURY INSTRUCTION NO. 21, DAMAGES: INCOME TAX EFFECTS OF AWARD, FILED SEPTEMBER 15, 2015 ..... 91a

APPENDIX J — JURY VERDICT OF THE UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA, FILED SEPTEMBER 15, 2015 ..... 92a

The following decision(s), opinion(s) and order(s) have been omitted in printing this Joint Appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED AUGUST 3, 2017 ..... 1a

Table of Appendices

Page

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FILED DECEMBER 15, 2015 ..... 25a

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED OCTOBER 26, 2017 ..... 31a

APPENDIX D — RELEVANT STATUTORY PROVISIONS 33a

APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, NO. 16-1123

Date Filed	Docket Text
01/15/2016	Civil case docketed. [4356520] [16-1123] (CYZ) [Entered: 01/15/2016 08:59 AM]
01/15/2016	Originating court document filed consisting of notice of cross-appeal, docket entries, order of 1/13/2016 [4356525] [16-1123] (CYZ) [Entered: 01/15/2016 09:05 AM]
01/15/2016	CROSS APPEAL BRIEFING SCHEDULE SET AS FOLLOWS: Transcript now due on 02/08/2016. Brief of BNSF Railway Company due 02/16/2016. [15-3355, 16-1123] (CYZ) [Entered: 01/15/2016 09:46 AM]
01/20/2016	Paper copies Appellant/Petitioner Brief, [4356332-2] filed by Mr. Michael D. Loos in 15-3355. 10 paper copies received. w/ Addendum attached [4358479] [15-3355, 16-1123] (MER) [Entered: 01/21/2016 03:10 PM]
01/20/2016	RECORD FILED - APLNT/PET APPENDIX, 1 volume, Location STL, Comments: 3 copies [4358485] [15-3355, 16-1123] (MER) [Entered: 01/21/2016 03:19 PM]

Appendix A

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03/01/2016	Originating court document filed consisting of Partial Satisfaction of Judgment dated 2/26/2016. [4373149] [15-3355, 16-1123] (CYZ) [Entered: 03/01/2016 04:17 PM]

***

03/16/2016	RECORD FILED - APLEE/CROSS-APLNT APPENDIX, 1 volume, Location STL, Comments: 3 copies [4379176] [15-3355, 16-1123] (MER) [Entered: 03/17/2016 04:08 PM]

***

03/17/2016	ADDENDUM of APPELLEE/CROSS-APPELLANT FILED by Appellee/ Cross-Appellant BNSF Railway Company in 15-3355, 16-1123 , w/service 03/15/2016 [4379030] [15-3355, 16-1123] (MER) [Entered: 03/17/2016 01:55 PM]

***

03/21/2016	BRIEF FILED - BRIEF APPELLEE/ CROSS APPELLANT filed by BNSF Railway Company in 15-3355, 16-1123. w/ service 03/18/2016 , Length: 16,306 words 10 COPIES OF PAPER BRIEFS FROM BNSF Railway Company due 03/28/2016

WITH certificate of service for paper briefs. Third brief of Michael D. Loos brief due on 04/20/2016. [4380002] [15-3355, 16-1123] (MER) [Entered: 03/21/2016 04:00 PM]

***

03/28/2016 BRIEF FILED - AMICUS BRIEF filed by United States of America in 16-1123, w/ service 03/23/2016 , Length: 3,331 words 10 COPIES OF PAPER BRIEFS FROM United States of America due 04/04/2016 WITH certificate of service for paper briefs [4382164] [16-1123, 15-3355] (MER) [Entered: 03/28/2016 09:17 AM]

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05/23/2016 ADDENDUM of APPELLANT/CROSS-APPELLEE THIRD BRIEF FILED by Appellant/Cross-Appellee Mr. Michael D. Loos in 15-3355, 16-1123 , w/service 05/20/2016 [4401755] [15-3355, 16-1123] (MER) [Entered: 05/23/2016 03:25 PM]

***

05/25/2016 BRIEF FILED - REPLY APPELLANT/ CROSS APPELLEE filed by Mr. Michael D. Loos in 15-3355, 16-1123, w/service 05/25/2016, Length: 9,898

words 10 COPIES OF PAPER BRIEFS FROM Michael D. Loos due 05/31/2016 WITH certificate of service for paper briefs. Fourth Brief of Appelle/Cross-Appellant BNSF Railway Company due on 06/08/2016. [4402778] [15-3355, 16-1123] (MER) [Entered: 05/25/2016 11:15 AM]

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05/31/2016 BRIEF FILED - AMICUS BRIEF filed by American Association for Justice in 15-3355, 16-1123 w/service 05/27/2016 Length: 5,644 words 10 COPIES OF PAPER BRIEFS FROM American Association for Justice due 06/06/2016 WITH certificate of service for paper briefs [4405316] [15-3355, 16-1123] (MER) [Entered: 05/31/2016 03:22 PM]

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06/16/2016 BRIEF FILED - REPLY APPELLEE/CR APPELLANT BRIEF filed by BNSF Railway Company in 15-3355, 16-1123 w/ service 06/15/2016 , Length: 5,757 words 10 COPIES OF PAPER BRIEFS FROM BNSF Railway Company due 06/21/2016 WITH certificate of service for paper briefs [4413696] [15-3355, 16-1123] (MER) [Entered: 06/16/2016 04:06 PM]

Appendix A

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05/09/2017 MOTION to participate in oral argument, filed by Attorney Ms. Marion E.M. Erickson for Amicus on Behalf of Appellant(s) United States of America in 16-1123 w/service 05/09/2017. [4534531] [16-1123, 15-3355] (MEE) [Entered: 05/09/2017 04:29 PM]

***

05/12/2017 MOTION to split argument time, filed by Attorney Ms. Jacqueline M. Holmes for Appellee BNSF Railway Company in 15-3355, Attorney Ms. Jacqueline M. Holmes for Appellant BNSF Railway Company in 16-1123 w/service 05/12/2017. [4535594] [15-3355, 16-1123] (JMH) [Entered: 05/12/2017 09:57 AM]

05/12/2017 JUDGE ORDER:Granting [4534531-2] motion of amicus curiae, United States to participate in oral argument on behalf of the appellant in the cross-appeal, BNSF Railway. It is further ordered that the United States' request for an additional five of minutes of oral argument time is granted. Hrg June 2017 [4535771] [15-3355, 16-1123] (BWB) [Entered: 05/12/2017 01:51 PM]

Appendix A

05/15/2017	JUDGE ORDER:Granting [4535594-2] motion of appellee/cross-appellant, BNSF Railway to allow two attorneys to present oral argument. Hrg June 2017 [4536247] [15-3355, 16-1123] (BWB) [Entered: 05/15/2017 02:41 PM]
	***
06/06/2017	ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, Morris S. Arnold, Raymond W. Gruender on 06/06/2017 Mr. Michael A. Wolff for Appellant/Cross-Appellee Mr. Michael D. Loos, Mr. William A. Brasher for Appellee/Cross-Appellant BNSF Railway Company and Ms. Nikki Lynn McArthur for Appellee/Cross-Appellant BNSF Railway Company in 15-3355, 16-1123. Ms. Marion E.M. Erickson for Amicus on Behalf of Cross-Appellant United 16-1123. Rebuttal by Mr. Michael A. Wolff for Mr. Michael D. Loos in 15-3355 RECORDED. Click Here To Listen to Oral Argument [4544122] [15-3355, 16-1123] (JMM) [Entered: 06/06/2017 11:48 AM]
08/03/2017	OPINION FILED - THE COURT: Roger L. Wollman, Morris S. Arnold and Raymond W. Gruender AUTHORING JUDGE:Raymond W. Gruender (PUBLISHED) [4564374] [15-3355, 16-

1123] (MER) [Entered: 08/03/2017 07:49 AM]

08/03/2017 JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, MORRIS S. ARNOLD and RAYMOND W. GRUENDER Hrg June 2017 [4564383] [15-3355, 16-1123] (MER) [Entered: 08/03/2017 08:15 AM]

08/10/2017 MOTION for extension of time to file petition for rehearing until 09/18/2017, filed by Attorney Ms. Alice Elizabeth Loughran for BNSF Railway Company w/service 08/01/2017. [4567453] [16-1123]--[Edited 08/11/2017 by LMT]--[Edited 08/11/2017 by LMT]--[Edited 08/11/2017 by LMT] (AEL) [Entered: 08/10/2017 04:01 PM]

08/15/2017 JUDGE ORDER: Granting [4567453-2] motion for extension of time to file rehearing filed by Attorney Ms. Alice Elizabeth Loughran for BNSF Railway Company. Petition for rehearing due on 09/18/2017. Hrg June 2017 [4568465] [16-1123] (MER) [Entered: 08/15/2017 10:47 AM]

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Appendix A

09/18/2017	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant BNSF Railway Company w/service 09/18/2017 [4580015] [16-1123] (AEL) [Entered: 09/18/2017 02:15 PM]
10/26/2017	JUDGE ORDER:Denying [4580015-2] petition for enbanc rehearing filed by Appellant BNSF Railway Company. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter.; [4580015-3] , PUBLISHED ORDER. Hrg June 2017 [4593776] [16-1123] (MER) [Entered: 10/26/2017 09:35 AM]
11/02/2017	MANDATE ISSUED. [4596338] [15-3355, 16-1123] (MER) [Entered: 11/02/2017 09:39 AM]

****

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT OF MINNESOTA (DMN) CIVIL DOCKET FOR CASE #: 0:13-CV-03373-PAM-FLN

Date Filed	#	Docket Text
12/09/2013	1	COMPLAINT against BNSF Railway Company. (Filing fee $400 receipt number 40076007) Case assigned to Judge Paul A. Magnuson per Master List and referred to Magistrate Judge Franklin L. Noel. Filed by Michael D. Loos. Filer requests summons issued. (Attachments: # 1 Civil Cover Sheet) (akl)DOCUMENT QC'D ON 12/10/13 LGL Modified on 12/10/2013 (LGL). (Entered: 12/09/2013)
		***
12/30/2013	3	ANSWER to Complaint by BNSF Railway Company. (Ferguson, Sally) (Entered: 12/30/2013)
		***
09/08/2015	116	Minute Entry for proceedings held before Judge Paul A. Magnuson: Jury Selection held on 9/8/2015, Jury Trial begun on 9/8/2015. Plaintiff's witness: Michael Loos. (Court Reporter Staci Hechert) (JEP) (Entered: 09/08/2015)

Appendix A

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09/09/2015	118	Minute Entry for proceedings held before Judge Paul A. Magnuson: Jury Trial continued on 9/11/2015. Plaintiff witnesses: John Kaye, Deb Kaye, Michael Loos, Karyn Loos, Dr. Kim Schaap via video deposition. (Court Reporter Kristine Mousseau/Jeanne Anderson) (JEP) Modified text on 9/10/2015 (JDF). (Entered: 09/09/2015)

***

09/11/2015	120	Minute Entry for proceedings held before Judge Paul A. Magnuson: Jury Trial continued on 9/11/2015. Oral motion-Def. Motion for Direct Verdict, argued, DENIED. (Trial to continue 9/14/15.) Defendant's witnesses: Benjamin Griffith, Bill Shuland, and John Wright. (Court Reporter Lori Simpson) (JEP) (Entered: 09/11/2015)

***

09/14/2015	122	Minute Entry for proceedings held before Judge Paul A. Magnuson: Jury Trial continued on 9/14/2015. Oral decision on motion-granting 121 Motion in Limine. (Trial to continue 9/15/15.) Defendant's witness: William

T. Simonet, M.D., P.A. (Court Reporter Heather Schuetz) (JEP) Modified file date on 9/15/2015 (JDF). (Entered: 09/15/2015)

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09/14/2015	124	Minute Entry for proceedings held before Judge Paul A. Magnuson: Jury Trial completed on 9/15/2015. (Court Reporter Carla Bebault) (JEP) (Entered: 09/15/2015)
09/15/2015	125	Final Jury Instructions. (JEP) (Entered: 09/15/2015)
09/15/2015	126	REDACTED JURY VERDICT. Pursuant to Fed. R. Civ. P. 5.2, unredacted version of this document is filed under seal. (Attachments: # 1 SEALED Original Jury Verdict) (AKL) (Entered: 09/16/2015)

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09/17/2015	129	JUDGMENT. (Attachments: # 1 Civil Notice - appeal)(TSS) (Entered: 09/17/2015)
09/25/2015	130	MOTION for Collateral Source Offset and NOTICE OF HEARING ON MOTION *for Collateral Source Offset*

(Miller, Lee) Modified on 9/28/2015 (TSS). (Entered: 09/25/2015)

10/07/2015 131 TEXT ONLY ENTRY: NOTICE to Attorneys: The Defendant's Motion for Collateral Source Offset (Doc. No. 130) will be decided by Judge Paul A. Magnuson without a hearing, on the submissions. Plaintiff's response is due by October 21, 2015. Any reply will be due by October 28, 2015. (JEP) (Entered: 10/07/2015)

10/07/2015 132 TEXT ONLY ENTRY: NOTICE to Attorneys: REVISED BRIEFING SCHEDULE: Doc. No. 130 Defendant's Motion for Collateral Source Offset. Defendant's Memorandum will be due by October 21, 2015. Plaintiff's response will be due by November 4, 2015. Any reply will be due by November 11, 2015. (JEP) (Entered: 10/07/2015)

***

10/16/2015 136 NOTICE OF APPEAL TO 8TH CIRCUIT as to 62 Order on Motion to Bifurcate,, Order on Motion for Summary Judgment,, Order on Motion for Continuance, by Michael D. Loos. Filing fee $ 505, receipt number

AMNDC-4608364. (McReynolds, Michael) (Entered: 10/16/2015)

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10/19/2015	138	TRANSMITTAL OF APPEAL LETTER TO U. S. COURT OF APPEALS, 8TH CIRCUIT, Re: Notice of Appeal to 8th Circuit 136. (JDF) (Entered: 10/19/2015)
10/21/2015	139	MEMORANDUM IN SUPPORT re 130 MOTION for Collateral Source Offset by BNSF Railway Company. (Ferguson, Sally) Modified text on 10/21/2015 (JDF). (Entered: 10/21/2015)
10/21/2015	140	AFFIDAVIT of Sally J. Ferguson in SUPPORT OF 139 MOTION Collateral Source Offset re 130 MOTION for Collateral Source Offset , 130 MOTION for Collateral Source Offset filed by BNSF Railway Company. (Attachments: # 1 Exhibit(s) A, # 2 Exhibit(s) B, # 3 Exhibit(s) C, # 4 Exhibit(s) D, # 5 Exhibit(s) E, # 6 Exhibit(s) F, # 7 Exhibit(s) G, # 8 Exhibit(s) H, # 9 Exhibit(s) I, # 10 Exhibit(s) J)(Ferguson, Sally) Modified text on 10/21/2015 (JDF). (Entered: 10/21/2015)

Appendix A

10/21/2015	141	LR7.1/LR72.2 WORD COUNT COMPLIANCE CERTIFICATE by BNSF Railway Company re 140 Affidavit in Support of Motion,, filed by BNSF Railway Company. (Ferguson, Sally) (Entered: 10/21/2015)
10/22/2015	142	Supplemental AFFIDAVIT of Sally J. Ferguson in SUPPORT OF 139 MOTION Collateral Source Offset re 130 MOTION for Collateral Source Offset filed by BNSF Railway Company. (Attachments: # 1 Exhibit(s) K)(Ferguson, Sally) Modified text on 10/23/2015 (JDF). (Entered: 10/22/2015)
10/22/2015	143	USCA Case Number 15-3355 for 136 Notice of Appeal to 8th Circuit filed by Michael D. Loos. (AKL) (Entered: 10/23/2015)

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11/04/2015	147	MEMORANDUM OF LAW in Opposition re 130 MOTION for Collateral Source Offset filed by Michael D. Loos. (Attachments: # 1 Certificate of Compliance)(McReynolds, Michael) Modified text on 11/5/2015 (JDF). (Entered: 11/04/2015)
11/04/2015	148	DECLARATION of Michael P. McReynolds in Opposition to 147 Response in Opposition to Motion filed

by Michael D. Loos. (McReynolds, Michael) Exhibit A is also included with this filing. Modified text on 11/5/2015 (JDF). (Entered: 11/04/2015)

11/04/2015 149 DECLARATION of Michael Loos in Opposition to 147 Response in Opposition to Motion filed by Michael D. Loos. Exhibit A is also included in the filing. (McReynolds, Michael) Modified text on 11/5/2015 (JDF). (Entered: 11/04/2015)

11/04/2015 150 DECLARATION of Karyn Loos in Opposition to 147 Response in Opposition to Motion filed by Michael D. Loos. Exhibit A is also included with this filing. (McReynolds, Michael) Modified text on 11/5/2015 (JDF). (Entered: 11/04/2015)

11/05/2015 151 NOTICE to USCA of subsequent filing in a civil case, Re: Reply 145 , Objection to Bill of Costs 144 , Declaration in Opposition 148 , Affidavit in Support 146, Declaration in Opposition 150, Response in Opposition to Motion 147, Declaration in Opposition 149. (JDF) (Entered: 11/05/2015)

***

11/11/2015	155	REPLY re 147 Response in Opposition to Motion filed by BNSF Railway Company. (Attachments: # 1 LR7.1/ LR72.2 Word Count Compliance Certificate)(Ferguson, Sally) (Entered: 11/11/2015)
11/11/2015	156	AFFIDAVIT of Sally J. Ferguson in SUPPORT OF 139 MOTION Collateral Source Offset re 130 MOTION for Collateral Source Offset filed by BNSF Railway Company. (Attachments: # 1 Exhibit(s) A)(Ferguson, Sally) Modified text on 11/12/2015 (JDF). (Entered: 11/11/2015)
11/12/2015	157	NOTICE to USCA of subsequent filing in a civil case, Re: Affidavit in Support of Motion, 156, Reply 155. (JDF) (Entered: 11/12/2015)
12/15/2015	158	IT IS HEREBY ORDERED that BNSF's Motion for Collateral Source Offsets 130 is Denied in Part and Granted in Part. (Written Opinion) Signed by The Hon. Paul A. Magnuson on 12/15/2015. (LLM) (Entered: 12/15/2015)
01/13/16	159	NOTICE OF APPEAL TO 8TH CIRCUIT as to 158 Order on Motion to Alter Judgment by BNSF Railway

Company. Filing fee $ 505, receipt number AMNDC-4730020. (Miller, Lee) (Entered: 01/13/2016)

01/13/2016 160 TRANSMITTAL OF APPEAL LETTER TO U. S. COURT OF APPEALS, 8TH CIRCUIT, Re: Notice of Appeal to 8th Circuit 159. (JDF) (Entered: 01/13/2016)

01/15/2016 161 USCA Case Number 16-1123 for 159 Notice of Appeal to 8th Circuit filed by BNSF Railway Company. (AKL) (Entered: 01/19/2016)

02/29/2016 162 PARTIAL SATISFACTION OF JUDGMENT by BNSF Railway Company. (Miller, Lee) (Entered: 02/29/2016)

03/01/2016 163 NOTICE to USCA of subsequent filing in a civil case, Re: Partial Satisfaction of Judgment 162. (JDF) (Entered: 03/01/2016)

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APPENDIX B — PARTIAL SATISFACTION OF JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FILED FEBRUARY 29, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No: 13-cv-03373-PAM-FLN
Case Type: FELA/FRSA

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

PARTIAL SATISFACTION OF JUDGMENT

Michael P. McReynolds, Attorney for Plaintiff Michael D. Loos ("Loos") hereby certifies that the judgment entered in the District Court in the above-entitled matter on the 17th day of September, 2015 in favor of Loos against Defendant BNSF Railway Company ("BNSF") for the sum of $126,212.78 has been partially satisfied in the amount of $112,290.13 and leaving the amounts of $3,949.35 and any accrued interest thereon, representing BNSF's Bill of costs and $3,765.00, and any accrued interest thereon, in dispute, representing the claimed employee's portion of Railroad Retirement Tier 1 and Tier 2 and Medicare

taxes, which have been paid to the U.S. Treasury per the attached, Affidavit of Donald S. Lee, with Exhibits A, B, and C and that the District Court is hereby authorized to partially discharge said judgment of record. Plaintiff's Bill of Costs for $16,791.99 remains to be addressed by the Court and added to the remaining unsatisfied portion of the Judgment.

IN TESTIMONY WHEREOF I have hereunto set my hard this 26th day of February, 2016.

Dated: 2-26-2016 TELLO LAW FIRM
Michael F. Tello (#156188)
Michael P. McReynolds (#154374)
2150 Third Avenue North, Ste. 10
Anoka, MN 55303
P: (763) 0159

Attorneys for Plaintiff Michael Loos

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No: 13-cv-03373-PAM-FLN
Case Type: FELA/FRSA

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF DONALD S. LEE

I, Donald S. Lee, being first duly sworn, do state, to the best of my knowledge and belief:

1. My name is Donald S. Lee. I am over the age of 21 and currently employed by BNSF Railway Company as Manager of Payroll Taxes, system-wide for BNSF Railway Company. I have personal knowledge of the facts set forth in this affidavit.

Appendix B

2. I am personally familiar with the requirements for withholding, remitting and reporting of Railroad Retirement Board (RRB) taxes Those taxes for employees consist of Tier 1, Tier 2 and Medicare taxes. The current rates for the employee portions are:

Tier 1: 6.2% of paid compensation up to $118,500 annually.

Ties 2: 4,9% of paid compensation up to $88,200 annually.

Medicare: 1.45% of compensation with no maximum.

Medicare: 0.9% of compensation in excess of $200,000.

3. BNSF is also required to pay the employer's portion of RRB Tier 1 and Tier 2 and Medicare taxes based on each employee's compensation as follows:

Tier 1: 6.2% of paid compensation up to $118,500 annually.

Tier 2: 13.1% of paid compensation up to $88,200 annually.

Medicare: 1.45% of compensation with no maximum.

Appendix B

4. For the **employee's** portion of the taxes for Mr. Loos, BNSF withheld and paid the following:

a.	Tier 1: (6.2% of paid compensation up to $118,500)	$1,860.00
b.	Tier 2: (4.9% of paid compensation up to $88,200)	$1,470.00
c.	Medicare: (1.45% of compensation, $30,000)	$435.00
d.	Total:	$3,765.00

5. Under the Railroad Retirement Tax Act (RRTA) the employee and employer portions of taxes under the Railroad Retirement Act (RRA) are administered by the IRS and are paid to the U.S. Treasury.

6. BNSF has complied with the reporting requirements of the RRA and RRTA and has submitted RRB Form BA-4 to the Railroad Retirement Board reporting, as payment for time lost, the amount of $30,000, which is the portion of the verdict allocated to past wage loss.

7. BNSF has paid the employer's portion of the RRB Tier I and Tier 2 and Medicare taxes on the amount of $30,000, the payment for time lost, which is the portion of the verdict allocated to past wage loss. BNSF has paid the following as the **employer's** portion of the RRTA taxes: $1,860.00 (Tier 1), $435.00 (Medicare) and $3,930.00 (Tier 2) for a total of $6,225.00. The employer's portion was paid by BNSF **in addition to** the judgment. This amount was

not withheld from the judgment. This amount was paid to the U.S. Treasury through the Electronic Federal Tax Payment System, Settlement Date February 8, 2016.

8. BNSF has withheld the employee portion of RRB and Medicare taxes as set forth above in the amount of $3,765.00 and on February 5, 2016, initiated payment to the U.S. Treasury through the Electronic Federal Tax Payment System (EFTPS) with a Settlement Date of February 8, 2016.

9. I attach as Exhibit A to this Affidavit, a copy of the "2015-Worksheet to Calculate RRT Due", a spreadsheet/document I prepared in the ordinary course of business for BNSF. This spreadsheet lists the calculations explained in the paragraphs above.

10. I attach as Exhibit B to this Affidavit, a copy of the Deposit Confirmation, showing Federal Tax Deposit, Settlement Date, February 8, 2016, of the amount of $9,990.00, and a copy of the Payroll Results Adjustment showing $9,990.00, to be the total of both the employee and employer portions of the RRB Tier 1 and Tier 2 and Medicare taxes on the amount of $30,000, the payment for time lost, which is the portion of the verdict allocated to past wage loss.

11. I attach as Exhibit C to this Affidavit, a copy of RRB Form BA-4: Report of Creditable Compensation Adjustments for Michael Loos, which was prepared and submitted to the RRB.

Appendix B

FURTHER, AFFIANT SAYETH NOT.

/s/_____
Donald S. Lee

Subscribed and sworn to before me this 10th day of February, 2016.

/s/_____
Notary Public

My Commission Expires 8.3.2016

Appendix B

For Exhibits A-C,
See Supplemental Appendix Page SA1

APPENDIX C – DECLARATION OF MICHAEL P. MCREYNOLDS IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR COLLATERAL SOURCE OFFSETS, FILED NOVEMBER 4, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No: :13-CV-03373-PAM-FLN
Case Type: FELA/FRSA

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY, A CORPORATION,

Defendant.

DECLARATION OF MICHAEL P. MCREYNOLDS

1. I am one of the attorneys for Plaintiff Michael Loos.

2. Attached as Exhibit A is a true and correct copy of Senior District Court Judge E. Richard Webber's Memorandum and Order of July 7, 2014 in *Cowden v. BNSF Railway Company,* United States District Court, Eastern District of Missouri, Eastern Division, Case No. 4:08CV01534 ERW, 2014 WL 3096867.

Appendix C

3. During the trial of this case, I spoke with BNSF counsel Lee A. Miller and BNSF Claim Representative William McFadden and proposed that BNSF pay the bills for the surgery and related medical treatment and physical therapy related to that surgery. These are the bills at issue in Defendant's motion. BNSF declined to pay the bills. Had BNSF agreed to pay the bills, they would not have been presented at trial. Typically, in my experience, defendant railroads pay such bills.

4. I have been practicing law since 1977 in the FELA field, including my first 10 years working for Union Pacific Railroad and Burlington Northern Railroad, now BNSF Railway Company. In the hundreds of cases I have been involved with, BNSF and other railroads agreed that FELA verdicts and settlements, were not taxable under the Internal Revenue regulations and the Railroad Retirement Tax Act. Only in the past few years has any suggestion been made that Railroad Retirement taxes should be deducted from FELA judgments.

5. Attached as Exhibit B is a provision from The National Railway Carriers and United Transportation Union Health and Welfare Plan, effective 7-1-2008, entitled Special Notice Concerning Claims Against A Participating Railroad For On-Duty Injuries. This provides that railroad insurance is intended to cover on-duty injuries such that railroads will not be double billed for insurance benefits provided under the agreement. This provision does not apply to the Loos bills at issue because BNSF refused to pay these bills. The plan is available online at www.yourtracktohealth.com.

Appendix C

This declaration is made in accordance with 28 U.S.C. § 1746, and I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of November, 2015 in Anoka, MN.

/s/_____
Michael P. McReynolds

APPENDIX D — INSTRUCTIONS FOR IRS FORM CT-1, EMPLOYER'S ANNUAL RAILROAD RETIREMENT TAX RETURN

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

2014
Instructions for Form CT-1
Employer's Annual Railroad Retirement Tax Return

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form CT-1 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/ct1*.

What's New

Changes to tax rates and compensation bases. For the 2014 tax rates and compensation bases, see *Employer and Employee Taxes*, later.

Reminders

Tier 1 Employee Additional Medicare Tax withholding. In addition to withholding Tier 1 Employee Medicare tax at 1.45%, you must withhold a 0.9% Tier 1 Employee Additional Medicare Tax from compensation you pay to an employee in excess of $200,000 in a calendar year.

Appendix D

You are required to begin withholding Tier 1 Employee Additional Medicare Tax in the pay period in which you pay compensation in excess of $200,000 to an employee and continue to withhold it each pay period until the end of the calendar year. Tier 1 Employee Additional Medicare Tax is only imposed on the employee. There is no employer share of Tier 1 Additional Medicare Tax. All compensation that is subject to Tier 1 Medicare tax is subject to Tier 1 Employee Additional Medicare Tax withholding if paid in excess of the $200,000 withholding threshold.

Visit IRS.gov and enter "Additional Medicare Tax" in the search box for more information on Tier 1 Employee Additional Medicare Tax.

Change of address. Use Form 8822-B. Change of Address or Responsible Party—Business, to notify the IRS of an address change.

Correcting a previously filed Form CT-1. If you discover an error on a previously filed Form CT-1, make the correction using Form CT-1 X, Adjusted Employer's Annual Railroad Retirement Tax Return or Claim for Refund. Form CT-1 X is filed separately from Form CT-1. For more information, see the Instructions for Form CT-1 X or visit IRS.gov and enter "correcting employment taxes" in the search box.

Federal tax deposits must be made by electronic funds transfer (EFT). You must use EFT to make all federal tax deposits. Generally, an EFT is made using the Electronic Federal Tax Payment System (EFTPS). If you do not want

to use EFTPS, you can arrange for your tax professional, financial institution, payroll service, or other trusted third party to make electronic deposits on your behalf. Also, you may arrange for your financial institution to initiate a same-day wire payment on your behalf. EFTPS is a free service provided by the Department of Treasury. Services provided by your tax professional, financial institution, payroll service, or other third party may have a fee.

To get more information about EFTPS or to enroll in EFTPS, visit the EFTPS website at *www.eftps.gov*, or call 1-800-555-4477 or 1-800-733-4829 (TDD). Additional information about EFTPS is also available in Pub. 966, Electronic Federal Tax Payment System: A Guide To Getting Started.

Outsourcing payroll duties. Employers are responsible to ensure that tax returns are filed and deposits and payments are made, even if the employer contracts with a third party to perform these acts. The employer remains responsible if the third party fails to perform any required action. If you choose to outsource any of your payroll and related tax duties (that is, withholding, reporting, and paying over taxes imposed by the Railroad Retirement Tax Act, FUTA, and income taxes) to a third-party payer, such as a payroll service provider or reporting agent, visit IRS.gov and enter "outsourcing payroll duties" in the search box for helpful information on this topic.

Paid preparers must sign Form CT-1. Paid preparers must complete and sign the paid preparer's section of Form CT-1.

Appendix D

Where can you get telephone help? You can call the IRS Business and Specialty Tax Line at 1-800-829-4933 or 1-800-829-4059 (TDD/TTY for persons who are deaf, hard of hearing, or have a speech disability) Monday-Friday from 7:00 a.m.-7:00 p.m. local time (Alaska and Hawaii follow Pacific time) for answers to your questions about completing Form CT-1 or tax deposit rules.

Additional information.

• Pub. 15 (Circular E), Employer's Tax Guide, contains information for withholding, depositing, reporting, and paying over employment taxes.

• Pub. 15-A, Employer's Supplemental Tax Guide, contains specialized and detailed employment tax information supplementing the basic information provided in Pub. 15 (Circular E).

• Pub. 15-B, Employer's Tax Guide to Fringe Benefits, contains information about the employment tax treatment of various types of noncash compensation.

• Pub. 915, Social Security and Equivalent Railroad Retirement Benefits, contains the federal income tax rules for social security benefits and equivalent Tier 1 railroad retirement benefits.

• The Railroad Retirement Board (RRB) website at *www.rrb.gov* contains additional employer reporting information and instructions.

Appendix D

You can order forms and publications by visiting *www.irs.gov/formspubs* or calling 1-800-TAX-FORM (1-800-829-3676).

Photographs of Missing Children

The IRS is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in instructions on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

General Instructions

Purpose of Form CT-1

These instructions give you some background information about Form CT-1. They tell you who must file Form CT-1, how to complete it line by line, and when and where to file it.

Use Form CT-1 to report taxes imposed by the Railroad Retirement Tax Act (RRTA). Use Form 941, Employer's QUARTERLY Federal Tax Return, or, if applicable, Form 944, Employer's ANNUAL Federal Tax Return, to report federal income taxes withheld from your employees' wages and other compensation.

Appendix D

Who Must File

File Form CT-1 if you paid one or more employees compensation subject to tax under RRTA.

A payer of sick pay (including a third party) must file Form CT-1 if the sick pay is subject to Tier 1 railroad retirement taxes. Include sick pay payments on lines 8-11 and, if the withholding threshold is met, line 12 of Form CT-1. Follow the reporting procedures for sick pay reporting in section 6 of Pub. 15-A.

Disregarded entities and qualified subchapter S subsidiaries (QSubs). Eligible single-owner disregarded entities and QSubs are treated as separate entities for employment tax purposes. Eligible single-member entities that have not elected to be taxed as corporations must report and pay employment taxes on compensation paid to their employees using the entities' own names and EINs. See Regulations sections 1.1361-4(a)(7) and 301.7701-2(c)(2)(iv).

Where To File

Send Form CT-1 to:

Department of the Treasury
Internal Revenue Service
Cincinnati, OH 45999-0007

Appendix D

When To File

File Form CT-1 by March 2, 2015.

Definitions

The terms "employer" and "employee" used in these instructions are defined in section 3231 and in its regulations.

Compensation

Compensation means payment in money, or in something that may be used instead of money, for services performed as an employee of one or more employers. It includes payment for time lost as an employee. A few exceptions are described below under *Exceptions*.

Group-term life insurance. Include in compensation the cost of group-term life insurance over $50,000 you provide to an employee. This amount is subject to Tier 1 and Tier 2 taxes, but not to federal income tax withholding. Include this amount on your employee's Form W-2, Wage and Tax Statement.

Former employees for whom you paid the cost of group-term life insurance over $50,000 must pay the employee's share of these taxes with their Form 1040, U.S. Individual Income Tax Return. You are not required to collect those taxes. For former employees, you must include on Form W-2 the part of compensation that consists of the cost of group-term life insurance over $50,000 and the amount of

railroad retirement taxes owed by the former employee for coverage provided after separation from service. For more information, see section 2 of Pub. 15-B and the General Instructions for Forms W-2 and W-3.

Timing. Compensation is considered paid when it is actually paid or when it is constructively paid. It is constructively paid when it is set apart for the employee, or credited to an account the employee can control, without any substantial limit or condition on how and when the payment is to be made.

Any compensation paid during the current year that was earned in a prior year is taxable at the current year's tax rates; you must include the compensation with the current year's compensation on Form CT-1, lines 1-12, as appropriate. An exception applies to nonqualified deferred compensation that was subject to Tier 1 and Tier 2 tax in a prior year. See the rules for social security, Medicare, and FUTA taxes under *Nonqualified Deferred Compensation Plans* in Pub. 15-A.

Exceptions. Compensation does not include:

• Certain benefits provided to or on behalf of an employee if at the time the benefits are provided it is reasonable to believe the employee can exclude such benefits from income. For information on what benefits are excludable, see Pub. 15-B. Examples of this type of benefit include:

1. Certain employee achievement awards under section 74(c),

2. Certain scholarship and fellowship grants under section 117,

3. Certain fringe benefits under section 132, and

4. Employer payments to an Archer MSA under section 220 or health savings accounts (HSA) under section 223.

• Stock transferred to an individual pursuant to the exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)); or the disposition of such stock by the individual.

• Payments made specifically for traveling or other bona fide and necessary expenses that meet the rules in the regulations under section 62.

• Payments for services performed by a nonresident alien temporarily present in the United States as a nonimmigrant under subparagraphs (F), (J), (M), or (Q) of the Immigration and Nationality Act.

• Compensation under $25 earned in any month by an employee in the service of a local lodge or division of a railway-labor-organization employer.

• Payments made to or on behalf of an employee or dependents under a sickness or accident disability plan or a medical or hospitalization plan in connection with sickness or accident disability. This applies to **Tier 2** taxes only.

Appendix D

For purposes of employee and employer Tier 1 taxes, compensation does not include sickness or accident disability payments made:

1. Under a workers compensation law,

2. Under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness due to an on-the-job injury,

3. Under the Railroad Retirement Act, or

4. More than 6 months after the calendar month the employee last worked.

Employer and Employee Taxes

Tax Rates and Compensation Bases

Tax Rates	Compensation Paid in 2014
Tier 1	
Employer and Employee: Each pay 6.2% of first	$117,000
Tier 1 Medicare	
Employer and Employee: Each pay 1.45% of	All
Tier 1 Employee Additional Medicare Tax withholding	
Employee: Pays 0.9% on compensation exceeding	$200,000

Appendix D

Tier 2

Employer: Pays 12.6% of first	$87,000
Employee: Pays 4.4% of first	$87,000

Employer Taxes

Employers must pay both Tier 1 and Tier 2 taxes, except for Tier 1 Employee Additional Medicare Tax. Tier 1 tax is divided into two parts. The amount of compensation subject to each tax is different. See the table above for the 2014 tax rates and compensation bases.

Concurrent employment. If two or more related corporations that are rail employers employ the same individual at the same time and pay that individual through a common paymaster that is one of the corporations, the corporations are considered a single employer. They have to pay, in total, no more in railroad retirement taxes than a single employer would. See Regulations section 31.3121 (s)-1 for more information.

Successor employers. Successor employers should see section 3231(e)(2)(C) and Pub. 15 (Circular E) to see if they can use the predecessor's compensation paid against the maximum compensation bases.

Employee Taxes

You must withhold the employee's part of Tier 1 and Tier 2 taxes. See the table under *Employer and Employee Taxes*, earlier, for the tax rates and compensation bases. See *Tips* below for information on the employee tax on tips.

Appendix D

Withholding or payment of employee tax by employer. You must collect the employee railroad retirement tax from each employee by withholding it from the compensation on which the employee tax is computed. If you do not withhold the employee tax, you must still pay the tax. If you withhold too much or too little tax because you cannot determine the correct amount, correct the amount withheld by an adjustment, credit, or refund according to the applicable regulations.

If you pay the railroad retirement tax for your employee rather than withholding it, the amount of the employee's compensation is increased by the amount of that tax. See Rev. Proc. 83-43, 1983-1 C.B. 778, for information on how to figure and report the proper amounts.

Tips. Your employee must report cash tips to you by the 10th day of the month following the month the tips are received. The report should include charged tips you paid over to the employee for charge customers, tips the employee received directly from customers, and tips received from other employees under any tip-sharing arrangement. Both directly and indirectly tipped employees must report tips to you. Cash tips must be reported for every month, unless the cash tips for the month are less than $20. Stop collecting the Tier 1 Employee tax when his or her compensation and tips for tax year 2014 reach $117,000. Collect the Tier 1 Employee Medicare tax for the whole year on all compensation and tips. Collect the Tier 1 Employee Additional Medicare Tax withholding on compensation and tips that exceed $200,000 for the calendar year. Include all tips your

employees reported to you even if you were unable to withhold the employee's share of tax.

An employee must furnish you with a written (or electronic) statement of cash tips, signed by the employee, showing (a) his or her name, address, and social security number; (b) your name and address; (c) the month or period for which the statement is furnished; and (d) the total amount of cash tips. Pub. 1244, Employee's Daily Record of Tips and Report to Employer, a booklet for daily entry of tips and forms to report tips to employers, is available at IRS.gov or by calling 1-800-TAX-FORM (1-800-829-3676).

Tips are considered to be paid at the time the employee reports them to you. You must collect both federal income tax and employee railroad retirement tax on cash tips reported to you from the employee's compensation (after withholding employee railroad retirement and federal income tax related to the nontip compensation) or from other funds the employee makes available. Apply the compensation or other funds first to the railroad retirement tax and then to federal income tax. You do not have to pay employer railroad retirement taxes on tips.

If, by the 10th of the month after the month you received an employee's tip income report, you do not have enough employee funds available to withhold the employee tax, you may report the excess amount without withholding the related tax. Report uncollected Tier 1 Employee tax, Tier 1 Employee Medicare tax, Tier 1 Employee Additional Medicare Tax withholding, and Tier

2 Employee tax on tips on line 14. See section 6 in Pub. 15 (Circular E).

Depositing Taxes

For Tier 1 and Tier 2 taxes, you are either a monthly schedule depositor or a semiweekly schedule depositor. However, see the ***$2,500 Rule*** and the ***$100,000 Next-Day Deposit Rule*** under ***Exceptions to the Deposit Rules***, later. The terms "monthly schedule depositor" and "semiweekly schedule depositor" identify which set of rules you must follow when a tax liability arises (for example, when you have a payday). They do not refer to how often your business pays its employees or to how often you are required to make deposits.

If you were a monthly schedule depositor for the entire year, please complete the ***Monthly Summary of Railroad Retirement Tax Liability*** in Part II of Form CT-1. If you were a semiweekly schedule depositor during any part of the year or you accumulated $100,000 or more on any day during a deposit period, you must complete Form 945-A, Annual Record of Federal Tax Liability.

Lookback Period

Before each year begins, you must determine the deposit schedule to follow for depositing Tier 1 and Tier 2 taxes for a calendar year. This is determined from the total taxes reported on your Form CT -1 for the calendar year lookback period. The lookback period is the second calendar year preceding the current calendar year. For

example, the lookback period for calendar year 2015 is calendar year 2013.

Use the table below to determine which deposit schedule to follow for 2015.

IF you reported taxes for the lookback period (2013) of ...	**THEN for 2015 you are a ...**
$50,000 or less	Monthly schedule depositor
More than $50,000	Semiweekly schedule depositor

Example. Employer A reported Form CT-1 taxes as follows:

- 2013 Form CT-1-$49,000
- 2014 Form CT-1-$52,000

Employer A is a monthly schedule depositor for 2015 because its Form CT-1 taxes for its lookback period (calendar year 2013) were not more than $50,000. However, for 2016, Employer A is a semiweekly schedule depositor because A's taxes exceeded $50,000 for its lookback period (calendar year 2014).

New employer. If you are a new employer, your taxes for both years of the lookback period are considered to be zero. Therefore, you are a monthly schedule depositor for the first and second years of your business. However, see *$100,000 Next-Day Deposit Rule*, later.

Appendix D

Adjustments and the lookback rule. To determine the amount of taxes paid for the lookback period, use only the Form CT-1 taxes reported on your original return. Adjustments to a return for a prior period are not taken into account in determining the taxes for that prior period.

Example. Employer B originally reported Form CT-1 taxes of $45,000 for the lookback period (2013). B discovered in March 2015 that the tax during the lookback period (2013) was understated by $10,000 and will correct this error with an adjustment on Form CT-1 X filed for 2013.

B is a monthly schedule depositor for 2015 because the lookback period Form CT-1 taxes are based on the amount originally reported ($45,000), which was not more than $50,000. For purposes of the lookback rule, the $10,000 adjustment does not affect either 2013 taxes or 2015 taxes. See Treasury Decision 9405 at *www-irs.gov/irb/2008-32_IRB/ar13.html.*

When To Deposit

Monthly Schedule Depositor

If you are a monthly schedule depositor, deposit employer and employee Tier 1 and Tier 2 taxes accumulated during a calendar month by the 15th day of the following month.

Example. Employer C is a monthly schedule depositor with seasonal employees. C paid compensation each Friday during March but did not pay any compensation

during April. Under the monthly schedule deposit rule, C must deposit the combined taxes for the March paydays by April 15. C does not have a deposit requirement for April (due by May 15) because no compensation was paid and, therefore, C does not have a tax liability for the month.

Semiweekly Schedule Depositor

If you are a semiweekly schedule depositor, use the table below to determine when to make deposits.

Deposit Tier 1 and Tier 2 taxes for payments made on ...	**No later than ...**
Wednesday, Thursday, and/or Friday	The following Wednesday
Saturday, Sunday, Monday, and/or Tuesday	The following Friday

Example. Employer D, a semiweekly schedule depositor, pays compensation on the last Saturday of each month. Although D is a semiweekly schedule depositor, D will deposit just once a month because D pays compensation only once a month. The deposit, however, will be made under the semiweekly deposit schedule as follows: D's taxes for the May 30, 2015 (Saturday), payday must be deposited by June 5, 2015 (Friday). Under the semiweekly deposit rule, taxes arising on Saturday through Tuesday must be deposited by the following Friday.

Appendix D

The last day of the calendar year ends the semiweekly deposit period and begins a new one.

Deposits on Business Days Only

If a deposit is required to be made on a day that is not a business day, the deposit is considered to have been made timely if it is made by the close of the next business day. A business day is any day other than a Saturday, Sunday, or legal holiday. For example, if a deposit is due on a Friday and Friday is a legal holiday, the deposit will be considered timely if it is made by the following Monday (if that Monday is a business day). The term "legal holiday" for deposit purposes includes only those legal holidays in the District of Columbia. For a list of legal holidays, see Pub. 15 (Circular E).

Semiweekly schedule depositors will always have at least 3 business days to make a deposit. If any of the 3 weekdays after the end of a semiweekly period is a legal holiday, you have 1 additional day to deposit. For example, if you have Form CT-1 taxes accumulated for payments made on Friday and the following Monday is a legal holiday, the deposit normally due on Wednesday may be made on Thursday (allowing 3 business days to make the deposit).

Exceptions to the Deposit Rules

The two exceptions that apply to the above deposit rules are the:

- $2,500 Rule, and

- $100,000 Next-Day Deposit Rule.

$2,500 Rule. If your total Form CT-1 taxes for the year are less than $2,500 and the taxes are fully paid with a timely filed Form CT-1, no deposits are required. However, if you are unsure that you will accumulate less than $2,500, deposit under the appropriate deposit rules so that you will not be subject to deposit penalties.

$100,000 Next-Day Deposit Rule. If you accumulate undeposited taxes of $100,000 or more on any day during a deposit period, you must deposit the taxes by the next business day regardless of whether you are a monthly or semiweekly schedule depositor.

If you are a monthly schedule depositor and you accumulate $100,000 or more on any one day during the month, you become a semiweekly schedule depositor on the next day for the remainder of the calendar year and for the following year.

Once a semiweekly schedule depositor accumulates $100,000 or more in a deposit period, it must stop accumulating at the end of that day and begin to accumulate anew on the next day. The following examples explain this rule.

Appendix D

Example of $100,000 Next-Day Deposit Rule. Employer E is a semiweekly schedule depositor. On Monday, E accumulates taxes of $110,000 and must deposit this amount by Tuesday, the next business day. On Tuesday, E accumulates additional taxes of $30,000. Because the $30,000 is not added to the previous $110,000, E must deposit the $30,000 by Friday using the semiweekly deposit schedule.

Example of $100,000 Next-Day Deposit Rule during the first year of business. Employer F started its business on May 1, 2015. Because this was the first year of its business, its Form CT-1 taxes for its lookback period (2013) are considered to be zero, and F is a monthly schedule depositor. On May 2, F paid compensation for the first time and accumulated taxes of $40,000. On May 8, F paid compensation and accumulated taxes of $60,000, bringing its total accumulated (undeposited) taxes to $100,000. Because F accumulated $100,000 or more on May 8 (Friday), F must deposit the $100,000 by May 11 (Monday), the next business day. F became a semiweekly schedule depositor on May 9. F will be a semiweekly schedule depositor for the rest of 2015 and for 2016.

Example of when $100,000 Next-Day Deposit Rule does not apply. Employer G, a semiweekly schedule depositor, accumulated taxes of $95,000 on a Tuesday (of a Saturday-through-Tuesday deposit period) and accumulated $10,000 on Wednesday (of a Wednesday-through-Friday deposit period). Because the $10,000 was accumulated in a deposit period different from the one in which the $95,000 was accumulated, the $100,000

Appendix D

Next-Day Deposit Rule does not apply. Thus, G must deposit $95,000 by Friday and $10,000 by the following Wednesday.

Electronic Deposit Requirement

You must use EFT to make all federal tax deposits. Generally, an EFT is made using the Electronic Federal Tax Payment System (EFTPS). To get more information about EFTPS or to enroll in EFTPS, visit the EFTPS website at *www.eftps.gov*, or call 1-800-555-4477 or 1-800-733-4829 (TDD). Additional information about EFTPS is also available in Pub. 966.

For an EFTPS deposit to be on time, you must submit the deposit by 8 p.m. Eastern time the day before the date the deposit is due.

Same-day wire payment option. If you fail to submit a deposit transaction on EFTPS by 8 p.m. Eastern time the day before the date a deposit is due, you can still make your deposit on time by using the Federal Tax Collection Service (FTCS). To use the same-day wire payment method, you will need to make arrangements with your financial institution ahead of time. Please check with your financial institution regarding availability, deadlines, and costs. Your financial institution may charge you a fee for payments made this way. To learn more about the information you will need to provide your financial institution to make a same-day wire payment, visit *www.irs.gov/e-pay* and click on *Same-Day Wire Federal Tax Payments.*

Appendix D

Accuracy of Deposits Rule. You are required to deposit 100% of your railroad retirement taxes on or before the deposit due date. However, penalties will not be applied for depositing less than 100% if both of the following conditions are met.

1. Any deposit shortfall does not exceed the greater of $100 or 2% of the amount of taxes otherwise required to be deposited.

2. The deposit shortfall is paid or deposited by the shortfall makeup date for each type of depositor as described below.

• **Monthly schedule depositor.** Deposit the shortfall or pay it with your return by the due date of Form CT-1. You may pay the shortfall with Form CT -1 even if the amount is $2,500 or more.

• **Semiweekly schedule depositor.** Deposit the shortfall by the earlier of the first Wednesday or Friday on or after the 15th of the month following the month in which the shortfall occurred. For example, if a semiweekly schedule depositor has a deposit shortfall during January 2015, the shortfall makeup date is February 18, 2015 (Wednesday).

Penalties and Interest

The law provides penalties for failure to file a return, late filing of a return, late payment of taxes, failure to make deposits, and late deposits unless reasonable cause is shown. Interest is charged on taxes paid late at the rate set by law. For more information, see Pub. 15 (Circular E).

Appendix D

If you receive a notice about a penalty after you file this return, reply to the notice with an explanation and we will determine if you meet reasonable-cause criteria. Do **not** attach an explanation when you file your return.

Use Form 843, Claim for Refund and Request for Abatement, to request abatement of assessed penalties or interest. Do not request abatement of assessed penalties or interest on Form CT-1 or Form CT-1 X.

Order in which deposits are applied. Generally, tax deposits are applied first to the most recent tax liability within the specified tax period to which the deposit relates. If you receive a failure-to-deposit penalty notice, you may designate how your payment is to be applied in order to minimize the amount of the penalty. You must respond within 90 days of the date of the notice. Follow the instructions on the notice you received. See Rev. Proc. 2001-58 for more information. You can find Rev. Proc. 2001-58 on page 579 of Internal Revenue Bulletin 2001-50 at *www.irs.gov/pub/irs-irbs/irb01-50.pdf.*

Trust fund recovery penalty. If taxes that must be withheld are not withheld or are not deposited or paid to the United States Treasury, the trust fund recovery penalty may apply. The penalty is 100% of the unpaid taxes. If these unpaid taxes cannot be immediately collected from the employer or business, the trust fund recovery penalty may be imposed on all persons who are determined by the IRS to be responsible for collecting, accounting for, or paying over these taxes, and who acted willfully in not doing so. For more information, see *Trust fund recovery penalty* in section 11 of Pub. 15 (Circular E).

Appendix D

Specific Instructions

Final Return

If you stop paying taxable compensation and will not have to file Form CT-1 in the future, you must file a final return and check the *Final return* box at the top of Form CT-1 under "2014." This final return should furnish information showing the last date on which you paid compensation you reported on Form CT-1.

The final return should be accompanied by a statement providing the address at which the records for your Forms CT-1 will be kept and the name of the person keeping the records. If the business has been transferred to another person, the statement should include the name and address of the transferee and the date of the transfer. If the business was not transferred or the transferee is not known, the statement should so state. The statement should be furnished in duplicate.

Processing of your return may be delayed if you do not provide the required amounts in the Compensation *and* Tax *columns.*

Line 1—Tier 1 Employer Tax

Enter the compensation (other than tips and sick pay) subject to Tier 1 Employer tax in the *Compensation* column. Multiply by 6.2% and enter the result in the *Tax* column. The total amount listed in the *Compensation* column for lines 1 and 8 combined may not be more than $117,000 per employee.

Appendix D

Line 2—Tier 1 Employer Medicare Tax

Enter the compensation (other than tips and sick pay) subject to Tier 1 Employer Medicare tax in the *Compensation* column. Multiply by 1.45% and enter the result in the *Tax* column.

Line 3—Tier 2 Employer Tax

Enter the compensation (other than tips) subject to Tier 2 Employer tax in the *Compensation* column. Do not enter more than $87,000 per employee. Multiply by 12.6% and enter the result in the *Tax* column.

Line 4—Tier 1 Employee Tax

Enter the compensation, including tips reported (but excluding sick pay), subject to Tier 1 Employee tax in the *Compensation* column. Multiply by 6.2% and enter the result in the *Tax* column. The total amount listed in the *Compensation* column for lines 4 and 10 combined may not be more than $117,000 per employee.

Stop collecting the 6.2% Tier 1 **Employee** tax when the employee's compensation (including sick pay) **and tips** reach the maximum for the year ($117,000 for 2014). However, your liability for Tier 1 **Employer** tax on compensation continues until the compensation (including sick pay), but **not including tips**, totals $117,000 for the year.

Appendix D

Line 5—Tier 1 Employee Medicare Tax

Enter the compensation, including tips reported (but excluding sick pay), subject to Tier 1 Employee Medicare tax in the *Compensation* column. Multiply by 1.45% and enter the result in the *Tax* column. For information on reporting tips, see *Tips*, earlier.

Line 6—Tier 1 Employee Additional Medicare Tax Withholding

Enter the compensation, including tips reported (but excluding sick pay) that is subject to Tier 1 Employee Additional Medicare Tax withholding. You are required to begin withholding Tier 1 Employee Additional Medicare Tax in the pay period in which you pay compensation in excess of $200,000 to an employee and continue to withhold it each pay period until the end of the calendar year. Tier 1 Employee Additional Medicare Tax is only imposed on the employee. There is no employer share of Tier 1 Additional Medicare Tax. All compensation (including sick pay) that is subject to Tier 1 Medicare tax is subject to Tier 1 Employee Additional Medicare Tax if paid in excess of the $200,000 withholding threshold.

Visit IRS.gov and enter "Additional Medicare Tax" in the search box for more information on Tier 1 Employee Additional Medicare Tax.

Appendix D

Line 7—Tier 2 Employee Tax

Enter the compensation, including tips reported, subject to Tier 2 Employee tax in the *Compensation* column. Only the first $87,000 of the employee's compensation (including tips) for 2014 is subject to this tax. Multiply by 4.4% and enter the result in the *Tax* column. For information on reporting tips, see *Tips,* earlier.

Any compensation paid during the current year that was earned in prior years (reported to the Railroad Retirement Board on Form BA-4, Report of Creditable Compensation Adjustments) is taxable at the current year tax rates, unless special timing rules for non qualified deferred compensation apply. See Publication 15-A. Include such compensation with current year compensation on lines 1-7, as appropriate.

Lines 8–12—Tier 1 Taxes on Sick Pay

Enter any sick pay payments during the year that are subject to Tier 1 taxes, Tier 1 Medicare taxes, and Tier 1 Employee Additional Medicare Tax withholding in the *Compensation* column. Multiply by the rate for the line and enter the result in the *Tax* column for that line. For Tier 1 Employer taxes, the total amount listed in the *Compensation* column for lines 1 and 8 combined may not be more than $117,000 per employee. For Tier 1 Employee taxes, the total amount listed in the *Compensation* column for lines 4 and 10 combined may not be more than $117,000 per employee. Tier 1 Medicare taxes are not subject to a dollar limitation.

Appendix D

All compensation (including sick pay) that is subject to Tier 1 Medicare tax is subject to Tier 1 Employee Additional Medicare Tax if paid in excess of the $200,000 withholding threshold.

If you are a railroad employer paying your employees sick pay, or a third-party payer who did not notify the employer of the payments (thereby subject to the employee and employer tax), make entries on lines 8-12. If you are subject to only the employer or employee tax, complete only the applicable lines. Multiply by the appropriate rates and enter the results in the *Tax* column.

Line 13—Total Tax Based on Compensation

Add lines 1 through 12 and enter the result on line 13.

Line 14—Adjustments to Taxes Based on Compensation

Do not use line 14 for prior period adjustments. Make all prior period adjustments on Form CT-1 X.

Enter on line 14:

• A fractions of cents adjustment (see *Adjustment for fractions of cents*, later);

• Credits for overpayments of penalty or interest paid on tax for earlier years; and

• Any uncollected Tier 1 Employee tax, Tier 1 Employee Medicare tax, Tier 1 Employee Additional Medicare Tax, and Tier 2 Employee tax on tips.

Appendix D

Enter the total of these adjustments in the *Tax* column. If you are reporting both an addition and a subtraction, enter only the difference between the two on line 14. If the net adjustment is negative, report the amount on line 14 using a minus sign, if possible. If your computer software does not allow the use of minus signs, you may use parentheses.

Do not include on line 14 any 2013 overpayment that is applied to this year's return (this is included on line 16).

Required statement. Except for adjustments for fractions of cents, explain amounts entered on line 14 in a separate statement. Include your name, employer identification number (EIN), calendar year of the return, and "Form CT-1" on each page you attach. Include in the statement the following information.

- An explanation of the item the adjustment is intended to correct showing the compensation subject to Tier 1 and Tier 2 taxes and their respective tax rates.

- The amount of the adjustment.

- The name and account number of any employee from whom employee tax was undercollected or overcollected.

- How you and the employee have settled any undercollection or overcollection of employee tax.

Adjustment for fractions of cents. If there is a difference between the total employee tax (lines 4-7 and 10-12) and the total actually withheld (employee compensation including tips plus the employer's contribution) due to rounding fractions of cents when collecting the tax, report the deduction or addition on line 14.

If this is the only entry on line 14, you are not required to attach a statement explaining the adjustment.

Line 15—Total Railroad Retirement Taxes Based on Compensation

Combine the amounts shown on lines 13 and 14 and enter the result on line 15.

Line 16—Total Deposits for the Year

Enter the total Form CT-1 deposits for the year, including any overpayment that you applied from filing Form CT-1 X and any overpayment that you applied from your 2013 return.

Line 17—Balance Due

If line 15 is more than line 16, enter the difference on line 17. Otherwise, see *Overpayment* below. You do not have to pay if line 17 is under $1. Generally, you should show a balance due on line 17 only if your total railroad retirement taxes based on compensation for the year (line 15) is less than $2,500. However, see *Accuracy of Deposits Rule*, earlier, regarding payments made under the accuracy of deposits rule.

Appendix D

If you were required to make federal tax deposits, pay the amount shown on line 17 by EFT. If you were not required to make federal tax deposits, you may pay the amount shown on line 17 by EFT, check, or money order. For more information on electronic payment options, visit the IRS website at *www.irs.gov/e-pay*.

If you pay by EFT, file your return using the address under *Where To File*, earlier. Do not file Form CT-1(V), Payment Voucher. If you pay by check or money order, make it payable to "United States Treasury." Enter your EIN, Form CT-1, and the tax period on your check or money order. Complete Form CT-1(V) and enclose with Form CT-1.

Line 18—Overpayment

If line 16 is more than line 15, enter the difference on line 18. **Never make an entry on both lines 18 and 17.** If line 18 is less than $1, we will send you a refund or apply it to your next return only if you ask us in writing to do so.

If you deposited more than the correct amount for the year, you can have the overpayment refunded or applied to your next return by checking the appropriate box on line 18. Check only one box on line 18. If you do not check either box or if you check both boxes, generally we will apply the overpayment to your account. We may apply your overpayment to any past due tax account that is shown in our records under your EIN.

Appendix D

Part II. Record of Railroad Retirement Tax Liability

This is a summary of your yearly tax liability, not a summary of deposits made. If line 15 is less than $2,500, do not complete Part II or Form 945-A.

If you are a monthly schedule depositor, enter your tax liability for each month and figure the total liability for the year. If you do not enter your tax liability for each month, the IRS will not know when you should have made deposits and may assess an "averaged" failure-to-deposit penalty. See section 11 of Pub. 15 (Circular E). If your tax liability for any month is negative (for example, if you are adjusting an overreported liability in a prior month), do not enter a negative amount for the month. Instead, enter zero for the month and subtract that negative amount from your tax liability for the next month.

Note. The amount shown on line V must equal the amount shown on line 15.

If you are a semiweekly schedule depositor or if you accumulate $100,000 or more in tax liability on any day in a deposit period, you must complete Form 945-A and file it with Form CT-1. Do not complete lines I-V if you file Form 945-A.

Third-Party Designee

If you want to allow an employee of your business, a return preparer, or another third party to discuss your 2014 Form CT-1 with the IRS, check the "Yes" box in the "Third-

Party Designee" section. Also, enter the designee's name, phone number, and any five digits that person chooses as his or her personal identification number (PIN).

By checking the "Yes" box, you are authorizing the IRS to speak with the designee to answer any questions relating to the processing of or the information reported on Form CT-1 . You are also authorizing the designee to do all of the following.

• Give the IRS any information that is missing from your return.

• Call the IRS for information about processing your return.

• Respond to certain IRS notices that you have shared with the designee about math errors and return preparation. The IRS will not send notices to your designee.

You are not authorizing the designee to receive any refund check, bind you to anything (including additional tax liability), or otherwise represent you before the IRS. If you want to expand the designee's authority, see Pub. 947, Practice Before the IRS and Power of Attorney.

The authorization will automatically expire 1 year from the due date (without regard to extensions) for filing your 2014 Form CT-1. If you or your designee wants to revoke this authorization, send the revocation or withdrawal to the IRS office at which you file your Form CT-1. See Pub. 947 for more information.

Appendix D

Who Must Sign

The following persons are authorized to sign the return for each type of business entity.

• **Sole proprietorship**—The individual who owns the business.

• **Corporation (including a limited liability company (LLC) treated as a corporation)**—The president, vice president, or other principal officer duly authorized to sign.

• **Partnership (including an LLC treated as a partnership) or unincorporated organization**—A responsible and duly authorized partner, member, or officer having knowledge of its affairs.

• **Single member LLC treated as a disregarded entity for federal income tax purposes**—The owner of the LLC or a principal officer duly authorized to sign.

• **Trust or estate**—The fiduciary.

Form CT-1 also may be signed by a duly authorized agent of the taxpayer if a valid power of attorney has been filed.

Alternative Signature method. Corporate officers or duly authorized agents may sign Form CT-1 by rubber stamp, mechanical device, or computer software program. For details and required documentation, see Rev. Proc.

2005-39, 2005-28 I.R.B. 82, at *www.irs.gov/irb/200 28_IRB/ar16.html.*

Paid Preparer Use Only

A paid preparer must sign Form CT-1 and provide the information in the *Paid Preparer Use Only* section of Part I if the preparer was paid to prepare Form CT-1 and is not an employee of the filing entity. The preparer must give you a copy of the return in addition to the copy to be filed with the IRS.

If you are a paid preparer, write your preparer tax identification number (PTIN) in the space provided. Include your complete address. If you work for a firm, write the firm's name and the EIN of the firm. You can apply for a PTIN at *www.irs.gov/ptin*, or by filing Form W-12, IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal. You cannot use your PTIN in place of the EIN of the tax preparation firm.

Generally, you are not required to complete this section if you are filing the return as a reporting agent and have a valid Form 8655, Reporting Agent Authorization, on file with the IRS. However, a reporting agent must complete this section if the reporting agent offered legal advice, for example, by advising the client on determining whether its workers are employees or independent contractors for federal tax purposes.

APPENDIX E — RAILROAD RETIREMENT INFORMATION PAMPHLET, DATED MAY 2008

RAILROAD RETIREMENT INFORMATION
U.S. RAILROAD RETIREMENT BOARD

Office of Public Affairs 844 North Rush Street
Chicago, Illinois 60611-2092
312-751-4777
312-751-7154 (fax)

For Publication May 2008

Railroad Retirement Service Credits and Pay for Time Lost

The Railroad Retirement Board (RRB) frequently receives questions from railroad employers, employees, and employees' legal advisors about the RRB's treatment of pay for time lost in retirement cases. The most common type of pay for time lost situation arises out of personal injury settlements. Other types include dismissal allowances, guaranteed wages, displacement allowances paid for loss of earnings resulting from the employee being placed in a position or occupation paying less money, and reinstatement awards which include back pay.

It is important that agreements between employers and employees involving pay for time lost are structured correctly for railroad retirement purposes because they are often intended to provide an employee with additional months of creditable service needed to qualify for railroad retirement benefits. Crediting fewer service months than intended may leave an employee ineligible for benefits,

while crediting an excessive number of months may delay the beginning date of those benefits. The following questions and answers describe the requirements for the crediting of pay for time lost under railroad retirement.

1. How do the railroad retirement laws treat pay for time lost?

Pay for time lost attributable to lost earnings for an identifiable period of absence from active service is treated as compensation creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts. Since the intent of an award for pay for time lost is to treat the employee as if he or she had actually performed compensated service during that period of time, the effect upon railroad retirement eligibility and benefits is identical to the effect of regular earnings for which service and compensation credit is received.

2. What factors should be taken into account to ensure that pay for time lost will be creditable for railroad retirement purposes?

A payment must be made with respect to an identifiable period of time. The specific months during the period of absence from active service must be identified, for example "the 12 month period beginning June 2007 and ending May 2008." In the case of a payment for personal injury, the entire amount is considered pay for time lost unless, at the time of payment, the employer states that a particular amount of the payment was for other reasons. The compensation is considered earned in, and therefore creditable to, the specified period.

Appendix E

An employment relationship must exist in the months to be credited with pay for time lost. Allocation toward future months is permissible as long as an employment relation is retained for that period. If a settlement agreement requires that an employee resign to receive the payment, the employment relation ceases upon resignation. Allocation after the resignation date is not allowed because it cannot be considered time lost as an employee. With respect to pay for time lost allocated into the future, service months and compensation are not creditable until the time lost has actually elapsed.

The allocation must also relate to the actual period of absence from service for which payment is made. Pay for time lost due to personal injury may not be allocated to service months missing from an employee's record before the date of injury. Similarly, the amount of the pay for time lost must relate to an employee's normal monthly pay. A monthly allocation of at least ten times the employee's daily pay rate in effect on the date of injury is ordinarily considered a reasonable relationship to actual lost earnings. A lesser amount would be considered a token payment and would not be acceptable. For example, if an employee normally earns $130 a day, the amount of pay for time lost allocated to each month should be at least $1,300.

3. What other factors should be considered to ensure that pay for time lost correctly provides the total of railroad retirement service months intended?

It is of primary importance to have a precise breakdown of an employee's service prior to any allocation. As a starting point, an employee should check his or her

most recent Form BA-6, or the employee may request a service and compensation statement from the RRB. This will avoid allocating pay for time lost to a month or months already reported as service months. Occasionally, an employee will have service months reported for vacation pay, or by another railroad employer--for example, by reason of paid union activity. Credit can only be received once for any given month. Because the period specified is the period for which service credit is due, a month allocated to the same month already on record may result in a shortage of the total months desired.

In addition, deemed service months should not be considered in the number of total service months when an allocation period is determined if those deemed service months are within the allocation period. A pay for time lost allocation increasing service and compensation will generally eliminate or reduce the number of deemed service months on record for any affected year. Deemed service months are the product of a calculation. If the components of that calculation change as the result of an adjustment to service and compensation due to a payment for time lost, then the number of deemed service months to which an employee is entitled is likely to change.

Also, the possibility that an employee has creditable military service should be considered because such military service may not be reflected in the RRB's records and may reduce the number of allocated months needed to attain annuity eligibility. Employees are encouraged to file proof of any military service well in advance of retirement so the RRB can determine whether the military service is creditable as railroad service. The RRB will include

creditable military service in its records, which will expedite the annuity application process and also ensure that the RRB's records of an employee's service are as complete as possible.

4. Is pay for time lost subject to railroad retirement tier I and tier II payroll taxes and/or employer contributions under the Railroad Unemployment Insurance Act?

Yes. As with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act at the tier I and tier II tax rates and annual maximum earnings bases in effect when payment is made. Pay for time lost is not, however, creditable on the basis of when the payment is made, but to the period for which the payment is allocated. Therefore, the taxable amount and creditable amount will sometimes differ. The employee's portion of the railroad retirement tax liability is usually withheld from the gross amount of the award.

Unlike tier I and tier II taxes, the amount of the employer contributions due under the Railroad Unemployment Insurance Act is computed at the rates in effect, subject to a monthly limit, during the months to which the payment is allocated.

5. What effect would pay for time lost have on the payment of a railroad retirement annuity or unemployment or sickness benefits for the same days?

Because pay for time lost is considered earned in the month allocated, an employee is not entitled to an annuity

under the Railroad Retirement Act with respect to any months to which pay for time lost has been allocated. If an employee applies for retirement benefits at the expiration of an allocation period, he or she should submit documentation of the period covered by the agreement with the application.

Similarly, an employee is not entitled to unemployment or sickness benefits under the Railroad Unemployment Insurance Act with respect to any months to which pay for time lost has been allocated. If a payment for time lost is made which covers a period for which benefits under the Railroad Unemployment Insurance Act were previously paid, the benefits would be subject to recovery.

6. Where can someone get more information about pay for time lost?

Additional information on pay for time lost, as well as other railroad retirement topics, is available on the RRB's Web site at www.rrb.gov. In addition, specific questions can be directed to the Railroad Retirement Board's Quality Reporting Service Center, 844 North Rush Street, Chicago, Illinois 60611-2092. Their phone number is (312) 751-4992.

APPENDIX F — PAY FOR TIME LOST FROM REGULAR RAILROAD EMPLOYMENT, PAMPHLET, FILED OCTOBER 21, 2015

TABLES INTENTIONALLY OMITTED

INTRODUCTION

The Railroad Retirement Board (RRB) frequently receives questions from railroad employers and employees and their respective legal agents about the treatment of pay for time lost from regular employment. Because this can be a complex and confusing subject, we have prepared this pamphlet to answer the most commonly asked questions about pay for time lost.

This pamphlet contains general information about pay for time lost. However, certain limitations, exceptions, and special cases are not covered. If you have any question about the information covered in this pamphlet, contact the nearest office of the RRB.

WHAT IS PAY FOR TIME LOST?

Pay for time lost is compensation paid by a railroad employer which is creditable under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA) and which is attributable to lost earnings for an identifiable period of absence from active service. ***Pay for time lost is not the purchase of service credits by payment of railroad retirement taxes.***

The intent behind the pay for time lost concept is to treat an employee as if he or she had actually performed

compensated service during an identifiable period of time. The effect of pay for time lost upon eligibility and benefits under the RRA and the RUIA is identical to the effect of regular earnings for which service and compensation credit are received.

The statutory basis for pay for time lost is found in Section 1 (h)(2) of the RRA (45 USC 231(h)(2)), Section 1(h)(i) of the RUIA (45 USC 351(i)), and Sections 211.3 and 322.6 of the Railroad Retirement Board's Regulations (20 CFR 211.3 and 322.6).

The most common type of pay for time lost arises out of "on the job" personal injury settlements, but other types of agreements may have pay for time lost provisions.

WHAT ARE SOME EXAMPLES OF PAY FOR TIME LOST?

Examples of pay for time lost include, but are not necessarily limited to, the following:

- A personal injury award or settlement which allocates a portion of the damages as lost wages for a specific period following the date of the injury.

- A reinstatement award which includes back pay for the period of lost wages.

- A dismissal allowance or guaranteed wage agreement.

- An allowance paid for the loss of earnings resulting from job displacement to a less remunerative position.

WHY IS IT IMPORTANT TO PREVENT PAY FOR TIME LOST PROBLEMS?

Unfortunately, it is not unusual for errors to be made when structuring a pay for time lost agreement and reporting the payment as creditable compensation to the employee's records at the Railroad Retirement Board. Some errors stem from a lack of a clear understanding of the nature of pay for time lost. Other errors occur because payments for time lost are usually made outside the regular payroll process.

It is important that pay for time lost agreements between employers and employees are structured correctly. Frequently, an agreement is established with the intent of attaining additional months of creditable railroad service so an employee will meet the service requirement for an annuity under the Railroad Retirement Act (RRA). If the agreement overlooks certain factors or does not meet the pertinent statutory requirements, the employee may be denied that annuity.

It is also important that pay for time lost be reported as service and compensation correctly and timely. Annuity applications under the RRA and benefit claims under the Railroad Unemployment Insurance Act (RUIA) are adjudicated with the information available on the employee's earnings record. If the record is not updated and if we have no knowledge of additional credit which

should be on the record, RRA annuities to disabled employees or RUTA benefits to sick or unemployed employees may be greatly delayed or even erroneously denied.

HOW DO I ENSURE PAY FOR TIME LOST IS CREDITABLE AS SERVICE AND COMPENSATION?

Six principles must be followed in order to ensure that a payment qualifies as creditable pay for time lost for which service and compensation credit may be received. The six principles are:

1. ***The payment must be made with respect to an identifiable period of time.***

The months of the period of absence from active service must be specified. For example, the agreement should state the pay for time lost is "for the 12 month period beginning October 1994 and ending September 1995." The compensation is considered earned in, and is therefore creditable to, that specified period.

2. ***An employment relationship must exist in the months to be credited with the pay for time lost.***

Pay for time lost may be allocated into the future as long as an employment relationship is retained for that period. If an agreement requires that an employee must resign in order to receive the payment, the employment relationship ceases upon the resignation. An allocation to months after the resignation date is not allowed because

the allocated service months cannot be considered genuine time lost as an employee.

If pay for time lost is allocated into the future and an employee does not resign, the service months are not creditable until the time lost has actually elapsed.

3. The allocation must relate to the actual period of absence from service for which the payment is made.

Pay for time lost due to a personal injury must be allocated to months after the date of the injury. Service months allocated to months missing from an employee's record before the injury is not allowed.

4. The amount of the pay for time lost must relate to an employee's normal monthly pay.

By regulation, a monthly allocation of at least ten times the employee's daily pay rate in effect on the date of the injury is ordinarily considered a reasonable relationship to actual lost wages. A lesser amount is considered to be a token payment and is not acceptable to the Railroad Retirement Board.

For example, Employee Jones had a daily pay rate of $130.00 when he was injured. Therefore, a minimum of $1,300.00 must be allocated as pay for each month allocated as time lost.

A higher compensation amount per month may be allocated, but it cannot exceed the annual maximum earnings base limitations for the years involved. Cost-

of-living or other increases which would have applied to the employee's pay over the period of time lost need not be considered.

5. ***The railroad retirement tax obligation for the pay for time lost must be met.***

Pay for time lost is considered compensation under the Railroad Retirement Tax Act. Thus, an employer is required to withhold and pay the employment taxes due on pay for time lost.

6. ***An agreement for pay for time lost must specify whether or not the intention of the payment is to provide service and compensation credit under the Railroad Retirement Act.***

If you do not intend to receive service and compensation credit for your pay for time lost, the agreement must say that.

ARE THERE ADDITIONAL FACTORS FOR ALLOCATING SERVICE MONTHS IN A PERSONAL INJURY CASE?

When the implicit intent of a personal injury allocation is to provide 120, 240, or 360 service months for the employee's record at the Railroad Retirement Board (RRB), it is vital to ensure that an allocation for time lost correctly provides the total number of service months desired.

Appendix F

If a shortage of service months occurs, the RRB has no authority to reallocate months. The allocation may be reopened only if both parties to the settlement are agreeable. However, it is important to note that the RRB will accept a re-opened agreement with respect to pay for time lost only within the four year time limitation imposed by Section 9 of the Railroad Retirement Act.

To prevent a shortage of service months, these three factors affecting service months must be considered:

1. ***Do not allocate pay for time lost to a month or months for which the employee has already received service month credit.***

Occasionally, an employee has service months reported for vacation pay or service months reported by another railroad employer (for example, union activity). However, credit can be received only one time for any given month.

Because the period specified is the period for which service credit is due, a month allocated to the same month already on record may result in a shortage of the total months desired. To prevent the duplicate reporting of service months, always contact the nearest office of the Railroad Retirement Board for an exact accounting of the months on record as of the date of the request.

Sometimes an award of back pay is for the same months for which service is already credited. In such a case, even though the months are not creditable, the compensation from the award is creditable.

Appendix F

2. ***When an allocation period is determined, do not consider deemed service months after the date of the personal injury in the total number of service months.***

A pay for time lost allocation increasing service and compensation will generally eliminate or reduce the number of deemed service months on record for any affected year. This is true because deemed service months are the product of a calculation. If the components of that calculation change as the result of an adjustment to service and compensation due to a payment for time lost, then the number of deemed service months to which an employee is entitled is likely to change.

3. ***Military service may, under certain conditions, be counted as railroad service under the Railroad Retirement Act (RRA).***

Creditable military service is not currently maintained in the records of the Railroad Retirement Board (RRB). The possibility that an employee has military service which meets the requirements to be creditable under the RRA should be considered because creditable military service may reduce the number of allocated months needed to attain eligibility for an annuity.

Contact the nearest office of the RRB for assistance in determining whether a military service period is creditable. Be prepared to provide proof of that military service to the RRB.

Appendix F

HOW IS PAY FOR TIME LOST ALLOCATED WHEN THERE IS A COURT ORDERED JUDGMENT?

When an employer pays an employee a settlement for a personal injury, the whole amount of the settlement is considered pay for time lost, ***if there is no designation that the settlement amount, or any part of it, is for factors other titan pay for time lost.***

When an employee receives a court ordered judgment as the result of a personal injury action against an employer, the employer and the employee may reach an agreement as to what amount of the judgment is attributable to time lost, ***if the judgment does not indicate that any amount of it is attributable for time lost.***

Absent an agreement between the employer and the employee, the Railroad Retirement Board (RRB) has the authority to determine what, if any, amount of the judgment is attributable to pay for time lost. The RRB's determination is based upon the pleadings and evidence submitted at the trial. ***Unlike the case of a settlement of a personal injury action, the payment to an employee by way of a judgment does not automatically result in a pay for time lost allocation.***

HOW IS PAY FOR TIME LOST TAXED FOR RETIREMENT PURPOSES?

All compensation under the Railroad Retirement Tax Act (RRTA) is subject to the Tier I and Tier II tax rates and the annual maximum earnings bases in effect when the payment is made. This is also true of pay for time lost.

Appendix F

The nature of pay for time lost is such that the payment is attributable to lost earnings in a different time period. Therefore, it is creditable, for retirement purposes under the Railroad Retirement Act, to the months to which the time lost payment relates. ***But, the taxation of the payment under the RRTA always relates to the calendar year in which the payment is made.***

HOW CAN THERE BE, FOR RETIREMENT PURPOSES, INCONSISTENT TAXING AND CREDITING OF THE SAME PAYMENT?

If a payment for time lost is allocated to a period other than the year of payment, the taxable amount and creditable amount of the pay for time lost may differ. There are circumstances where pay for time lost may be fully creditable under the Railroad Retirement Act, but taxable only to a limited extent, or not taxable at all, under the Railroad Retirement Tax Act. On the other hand, pay for time lost may be taxed at a higher percentage rate and subject to a higher earnings base than it would have been had it actually been paid in the period for which it is considered creditable.

HOW IS PAY FOR TIME LOST TAXED FOR MEDICARE PURPOSES?

Medicare taxes must be withheld from a payment for time lost. The railroad retirement and Medicare parts of the Tier I tax rate have separate, different earnings bases. When an employee's taxable earnings attain the Tier I maximum earnings base, Medicare taxes must continue

to be deducted because there is no Medicare maximum amount.

HOW IS PAY FOR TIME LOST TAXED FOR UNEMPLOYMENT/SICKNESS PURPOSES?

Unlike Tier I and Tier II tax, the amount of the employer contributions due under the Railroad Unemployment Insurance Act is computed at the rates in effect, subject to a monthly limit, during the months to which the pay for time lost payment relates.

IS THE TAX LIABILITY OF PAY FOR TIME LOST MET BY WITHHOLDING A REIMBURSEMENT AMOUNT FOR BENEFITS RECOVERABLE UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT (RUIA)?

Reimbursement is due under the RUIA if a payment for time lost covers a period for which sickness or unemployment benefits were previously paid. However, withholding this amount from the award is a separate matter and should never be confused with satisfying the railroad retirement tax liability for the award.

WHERE CAN I GET INFORMATION ABOUT TAX RATES AND EARNINGS BASES?

Information about the annual tax rate percentages, maximum earnings base amounts, and employer contribution amounts for any year may be obtained from the nearest office of the Railroad Retirement Board. The

payroll department of any railroad employer should also be able to provide this information.

IF I'M NOT WORKING, CAN I PURCHASE ADDITIONAL SERVICE MONTHS BY PAYING ADDITIONAL TAXES?

An employee who is not working may not buy additional service months simply by paying the taxes for the months desired. ***Service months may never be bought just by tile payment of taxes.***

IS PAY FOR TIME LOST INCLUDABLE AS WAGES FOR INCOME TAX PURPOSES?

The Railroad Retirement Board cannot speak authoritatively on issues involving income tax law. Therefore, we must refer questions relating to the treatment of pay for time lost under federal income tax laws to the Internal Revenue Service (IRS). However, we can advise that, in the past, under certain conditions, the IRS has held that pay for time lost is includable as wages for income tax purposes.

DOES WITHHOLDING THE CORRECT TAX AMOUNT UPDATE MY SERVICE AND COMPENSATION RECORD?

Withholding the proper taxes is not sufficient to update an employee's record of service and compensation at the Railroad Retirement Board (RRB). An appropriate report of service and compensation must also be submitted by the

employee's railroad employer. As noted previously, pay for time lost should be reported as service and compensation for the allocated period of absence because it is considered earned under the Railroad Retirement Act in that period.

An employee applying for retirement benefits at the expiration of an allocation period should submit documentation of the period covered by the agreement with the retirement application. This is necessary to establish service eligibility if the report for additional service credit is not yet reflected in the employee's records at the RRB. The RRB will then solicit the necessary service and compensation report, but the final annuity award must be delayed until the report is received.

HOW DOES PAY FOR TIME LOST AFFECT MY ENTITLEMENT TO AN ANNUITY OR SICKNESS/ UNEMPLOYMENT BENEFITS?

Because pay for time lost is effectively the same as compensated service for active employment, an employee is not entitled to an annuity under the Railroad Retirement Act with respect to any months to which pay for time lost has been allocated. For this reason, a pay for time lost allocation to an employee who is already receiving an annuity may cause an annuity overpayment.

For example, an injured employee may apply for and begin receiving a disability annuity while his settlement is pending. If the settlement is finalized and includes pay for time lost for months for which he was also paid an annuity, the annuity is overpaid for those months.

Similarly, an employee is also not entitled to sickness or unemployment benefits under the Railroad Unemployment Insurance Act (RUIA) with respect to any month to which pay for time lost is allocated. If a payment for time lost is made which covers a period for which benefits under the RUIA were previously paid, a reimbursement is due under the RUIA.

WHERE CAN I GET MORE INFORMATION?

The Claims Adjustment and Settlement Section in the Bureau of Unemployment and Sickness Insurance can provide information about the correct amount to withhold from pay for time lost for reimbursement of benefits paid under the Railroad Unemployment Insurance Act. The telephone number of the Claims Adjustment and Settlement Section is (312) 751-4820.

Questions relating to the treatment of pay for time lost under Federal income tax laws should be directed to the Internal Revenue Service.

Any other questions about pay for time lost should be directed to the nearest office of the Railroad Retirement Board (RRB). Addresses and telephone numbers for offices of the RRB are listed in telephone directories under "United States Government." Most business can be conducted by telephone, but if you need to visit an office, you may want to call ahead to arrange a convenient time.

Appendix F

NONDISCRIMINATION ON THE BASIS OF DISABILITY

Under Section 504 of the Rehabilitation Act of 1973 and Railroad Retirement Board (RRB) regulations, no qualified person may be discriminated against on the basis of disability. RRB programs and activities must be accessible to all qualified applicants and beneficiaries, including those who are vision or hearing-impaired. Disabled persons needing assistance (including auxiliary aids or program information in accessible formats) should contact the nearest RRB office. Complaints of alleged discrimination by the RRB on the basis of disability must be filed within 90 days in writing with the Director of Administration, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092. Questions about individual rights under this regulation may be directed to the RRB's Director of Equal Opportunity at the same address shown above.

FRAUD AND ABUSE HOT LINE

Call the toll-free Fraud and Abuse Hot Line if you have reason to believe that someone is receiving railroad retirement or unemployment-sickness benefits to which (s)he is not entitled; that persons responsible for the financial affairs of minors or incompetent beneficiaries are misappropriating benefits; or that a doctor, hospital, or other provider of health care services is performing unnecessary or inappropriate services or is billing Medicare for services not received. You may also use the Hot Line to report any suspected misconduct by a

Appendix F

Railroad Retirement Board (RRB) employee. The Hot Line has been installed by the RRB's Inspector General to receive any evidence of fraud or abuse of the RRB's benefit programs.

Call (toll-free) 1-800-772-4258. Or you may send your complaints in writing to the RRB, OIG, Hot Line Officer, 844 North Rush Street, Chicago, Illinois 60611-2092.

Please do not call the Inspector General's Hot Line with questions about eligibility requirements, delayed claims, or similar problems. Such matters should be directed to the nearest RRB field office.

APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FILED SEPTEMBER 17, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JUDGMENT IN A CIVIL CASE

Case Number: 13cv03373 PAM/FLN

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Defendant BNSF Railway Company was negligent in failing to provide Plaintiff Michael

Loos reasonably safe conditions for work on December 19, 2010.

2. Defendant BNSF Railway Company's negligence did cause, in whole or in part, injury to Plaintiff Michael Loos on December 19, 2010.

3. Plaintiff Michael Loos was not negligent in connection with the December 19, 2010 incident.

4. The amount found to fairly and adequately compensate Plaintiff Michael Loos for damages sustained as a result of the December 19, 2010 incident up to the time of this verdict is as follows:

   a. Past pain, disability, and emotional distress: $85,000.00

   b. Past wage loss: $30,000.00

   c. Past medical expenses: $11,212.78.

5. The amount of money found to fairly and adequately compensate Plaintiff Michael Loos for damages reasonably certain to occur in the future as a result of the December 19, 2010 incident is as follows:

   a. Future pain, disability, and emotional distress: $0

   b. Loss of future earning capacity: $0.

Appendix G

Date: September 17, 2015

RICHARD D. SLETTEN, CLERK

s/Jackie Phipps
(By) Jackie Phipps, Deputy Clerk

s/Paul A. Magnuson
PAUL A. MAGNUSON
United States District Judge

APPENDIX H — JURY INSTRUCTION NO. 18, DAMAGES: INJURY TO EMPLOYEE, FILED SEPTEMBER 15, 2015

Loos v. BNSF Railway Co.,
Case No. 13-cv-3373

INSTRUCTION NO. 18

DAMAGES: INJURY TO EMPLOYEE

8th Cir. 15.70

If you find in favor of the plaintiff, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence. You should consider the following elements of damages:

1. Reasonable and necessary medical expenses needed by and actually provided to the plaintiff to date.

2. The physical pain and emotional suffering the plaintiff has experienced and is reasonably certain to experience in the future; the nature and extent of the injury, whether the injury is temporary or permanent and whether any resulting disability is partial or total, including any aggravation of a pre-existing condition;

3. The earnings the plaintiff has lost to date and the present value of earnings the plaintiff is reasonably certain to lose in the future;

Appendix H

4. The reasonable value of household services that plaintiff has been unable to perform for himself to date and the present value of household services he is reasonably certain to be unable to perform for himself in the future.

Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.

You may not include in your award any sum for court costs or attorneys' fees.

If you assess a percentage of negligence to the plaintiff by reason of Instruction No. 14, do not diminish the total amount of damages by the percentage of negligence you assess to the plaintiff. The Court will do this.

APPENDIX I — JURY INSTRUCTION NO. 21, DAMAGES: INCOME TAX EFFECTS OF AWARD, FILED SEPTEMBER 15, 2015

Loos v. BNSF Railway Co.,
Case No. 13-cv-3373

INSTRUCTION NO. 21

DAMAGES: INCOME TAX EFFECTS OF AWARD

8th Cir. 15.73

The plaintiff will not be required to pay any federal or state income taxes on an amount that you award.

APPENDIX J — JURY VERDICT OF THE UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA, FILED SEPTEMBER 15, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

File No. 13-cv-03373 (PAM/FLN)

MICHAEL D. LOOS,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

VERDICT

We, the jury, answer the following questions presented to us:

1. Was Defendant BNSF Railway Company negligent in failing to provide Plaintiff Michael Loos reasonably safe conditions for work on December 19, 2010?

   Yes _X_ No ___

   If you answered "No" to Question 1, your deliberations are complete and your foreperson should sign and date the last page of this verdict form. If you answered "Yes" to Question 1, please answer Question 2.

2. If your answer to Question 1 was "yes," then answer this question: Did Defendant BNSF Railway Company's negligence cause, in whole or in part, injury to Plaintiff Michael Loos on December 19, 2010?

   Yes _X_ No ___

   If you answered "No" to Question 2, your deliberations are complete and your foreperson should sign and date the last page of this verdict form. If you answered "Yes" to Question 2, please answer Question 3.

3. Was Plaintiff Michael Loos negligent in connection with the December 19, 2010, incident?

   Yes ___ No _X_

   If you answered "Yes" to Question 3, please answer Question 4. If you answered "No" to Question 3, please proceed to Question 6.

4. If your answer to Question 3 was "yes," then answer this question: Was Plaintiff Michael Loos's negligence a cause, in whole or in part, of any injuries he sustained as a result of the December 19, 2010, incident?

   Yes ___ No ___

   If you answered "Yes" to Question 4, please answer Question 5. If you answered "No" to Question 4, please proceed to Question 6.

Appendix J

5. If you answered "yes" to Questions 2 and 4, then answer this question: Taking the negligence of both parties to be 100%, what percent do you attribute to:

Defendant BNSF Railway Company	_____%
Plaintiff Michael Loos	_____%
Total	100%

If you answered "Yes" to Questions 1 and 2, and regardless of your answers to Questions 3, 4, or 5, please answer Questions 6 and 7.

6. What amount of money, without any reduction for any negligence which you may find on Plaintiffs part, do you find will fairly and adequately compensate Plaintiff Michael Loos for damages sustained as a result of the December 19, 2010 incident up to the time of this verdict, in the following categories:

a. Past pain, disability, and emotional distress:	$ 85,000
b. Past wage loss	$ 30,000
c. Past medical expenses	$11,212.78

7. What amount of money, without any reduction for any negligence which you may find on the Plaintiff's part, do you find will fairly and adequately compensate Plaintiff Michael Loos for damages reasonably certain to occur in the future as a result of the December 19, 2010 incident, in the following categories:

Appendix J

a. Future pain, disability, and emotional distress: $ 0

b. Loss of future earning capacity $ 0

Dated: 9/15, 2015

REDACTED

No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding below.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. Berkshire Hathaway Inc. owns 10% or more of National Indemnity Company.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

INTRODUCTION 2

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT 2

A. Railroad Retirement System 2

B. Statutory Definition of "Compensation" 5

C. The Interpretations of Federal Agencies 9

D. The Relevant Facts and Procedural History 11

E. The Opinion of the Eighth Circuit 12

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. THE RRTA'S DEFINITION OF TAXABLE COMPENSATION INCLUDES PAY FOR TIME LOST 17

A. The Statutory Text 17

B. The Statutory Context 23

C. The Statutory History 27

D. The Longstanding IRS Regulations Are Consistent With The Statutory Text, Context, and History 34

II. THERE IS NO EXEMPTION IN THE RRTA FOR LOST WAGES DUE TO A PERSONAL INJURY 37

A. Congress Did Not Identify Section 104 As An Exclusion From The RRTA 38

B. The Analogy To FICA Taxes Does Not Apply 45

CONCLUSION 48

TABLE OF AUTHORITIES

Page(s)

Cases

A. Brod, Inc. v. SK & I Co.,
998 F. Supp. 314 (S.D.N.Y. 1998) 29

Alton Railroad Co. v. R.R. Retirement Bd.,
16 F. Supp. 955 (D. D.C. 1936) 5

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463 U.S. 855 (1983) 21

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935 F. Supp. 425 (S.D.N.Y. 1996) 29

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628 F. Supp. 1431 (D. Kan. 1986) 33

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790 F.2d 853 (11th Cir. 1986) 25

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No. 93–0277–CV–W–2, 1995 WL
218576 (W.D. Mo. Feb. 14, 1995) 26

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No 06-cv-704, 2012 WL 1424168
(M.D. Fla. Feb. 13, 2012) 22

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467 U.S. 837 (1984) 13, 36

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35 Fed. Cl. 447 (1996) 33

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No. 4:08-cv-01534, 2014 WL 3096867
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495 U.S. 472 (1990) 45

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556 U.S. 568 (2009) 21

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375 U.S. 253 (1963) 3

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567 U.S. 1 (2012) 42

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409 U.S. 239 (1972) 25

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314 U.S. 95 (1941) 23

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508 U.S. 402 (1993) 37

Hance v. Norfolk S. Ry. Co.,
571 F.3d 511 (6th Cir. 2009) 22

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837 N.W.2d 532 (Neb. 2013) 22

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439 U.S. 572 (1979) 2, 3

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140 A.3d 16 (Pa. Super. Ct. 2016) 22, 25, 27, 47

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970 F.2d 295 (7th Cir. 1992) 26

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562 U.S. 44 (2011) 36

Mickey v. BNSF Ry Co.,
437 S.W.3d 207 (Mo. 2014) 22, 38

Missouri Pac. Truck Lines, Inc. v. United States,
3 Cl. Ct. 14 (1983), *aff'd*, 736 F.2d 706 (Fed. Cir. 1984) 26

Munoz v. Norfolk S. Ry.,
2018 IL App (1st) 171009 (Ill. App. 2018) 22

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Case No. 0807-10580, 2012 WL 12526344 (Oregon Cir. Ct. Mar. 5, 2012) 22

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416 U.S. 267 (1974) 36

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No. 2160823, __ So. 3d __, 2018 WL
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United States*,
288 U.S. 294 (1933) 36

P.C. Pfeiffer Co. v. Ford,
444 U.S. 69 (1979) 24

Phillips v. Chicago Cent. & Pacific R.R.,
853 N.W.2d 636 (Iowa. 2014) 22, 25, 33

*Railroad Retirement Board v. Alton
Railroad Company*,
295 U.S. 330 (1935) 5

Shattuck v. Gallagher,
218 F.3d 428 (6th Cir. 1955) 24

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327 U.S. 358 (1946) 13, 14, 19, 20

*Standard Office Bldg. Corp. v. United
States*,
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Timbers of Inwood Forest Associates*,
484 U.S. 365 (1988) 23

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537 U.S. 71 (2002) 39

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389 U.S. 299 (1967) 4, 34

United States v. Gonzalez,
520 U.S. 1 (1997) 18

United States v. Quality Stores, Inc.,
134 S. Ct. 1395 (2014) 13, 14, 20, 22

Universal Carloading & Distrib. Co. v. Pedrick,
184 F.2d 64 (2d Cir. 1950) 25

Vodden v. BNSF Ry. Co.,
No. 27 CV-11-18376, 2012 WL 7150849 (Minn. Dist. Ct. Dec. 19, 2012) 22

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138 S. Ct. 2067 (2018) ..... *passim*

Statutes

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26 U.S.C. § 3121(b) 20

26 U.S.C. § 3201 3

26 U.S.C. §§ 3201, 3232(a), 3231(e) 39

26 U.S.C. §§ 3201(a), (b) 5

26 U.S.C. § 3202(a) 4

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26 U.S.C. §§ 3221(a), (b) 5

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26 U.S.C. § 3231(e)(1) 23

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26 U.S.C. § 7805 ..... 4, 9, 34

28 U.S.C. § 1257 2

42 U.S.C. § 410(a)(9) 2

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45 U.S.C. § 231a(b) 3

45 U.S.C. § 231b 3, 5

45 U.S.C. § 231b(b) 26

45 U.S.C. § 231f 4

45 U.S.C. § 231f(b)(6) 4

45 U.S.C. § 231h 4

45 U.S.C. § 352 3

Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (Aug. 29, 1935) 28

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Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066 39

Legislative History and Congressional Record

121 Cong. Rec. 24479 (July 24, 1975) 31

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INTRODUCTION

Railroad employees participate in a separate retirement system governed by two federal statutes. The Railroad Retirement Act (RRA) determines the benefits to be paid, based on employee "compensation." The Railroad Retirement Tax Act (RRTA) funds those benefits by imposing taxes, also based on employee "compensation." These statutes represent two sides of the same coin: the RRA is the expenditure side, and the RRTA is the revenue side. *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1989).

In this case, however, the court of appeals held that a jury award for lost wages would not be taxable as compensation under the RRTA, even though it could be considered as compensation for purposes of benefits under the RRA. The court's decision is inconsistent with the statutory text as illuminated by this Court's decisions, with the statutory context created by the two parallel statutes, and with decades of interpretation by the responsible federal agencies.

The amount directly at stake in this case is limited. But the principle is an important one. If employees can receive payments that increase their benefits but do not count toward their taxes, the system is asymmetrical and inherently unstable. The nation's railroads have a long-term interest in the stability and adequate funding of the rail retirement system.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 865 F.3d 1106 and reprinted in the appendix attached to the petition ("Pet.App.") at 1a–24a. The Eighth Circuit's order denying rehearing or rehearing en banc (Pet.App. 31a-32a) is not reported. The opinion of the district court is unpublished. (Pet.App. 25a–30a.)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Eighth Circuit entered its judgment on August 3, 2017 and denied BNSF's timely petition for rehearing or rehearing en banc on October 26, 2017. BNSF filed a timely petition for certiorari on January 23, 2018. This Court granted certiorari review on May 14, 2018.

STATEMENT

A. Railroad Retirement System

In the 1930s, Congress established the Railroad Retirement system, which remains separate from Social Security today.[1] "The Railroad Retirement Act, . . . provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573 (1979). The legislation to manage this system consists primarily of two federal statutes.

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[1] *See* 42 U.S.C. § 410(a)(9); *Wisconsin Cent. Ltd. v United States*, 138 S. Ct. 2067, 2070 (2018).

The Railroad Retirement Act sets the benefit levels. "In its modern form, the Act resembles both a private pension program and a social welfare plan. It provides two tiers of benefits." *Hisquierdo*, 439 U.S. at 574. Tier I benefits take the place of Social Security, from which railroad workers are exempt, and Tier II benefits are similar to those that workers would receive from a private multi-employer pension fund. *Id.* The benefits are computed based on the length of time for which the employee receives "compensation" from the employer.[2] Benefits for railroad employees include payments for sickness or disability that may arise from a workplace injury.[3]

The Railroad Retirement Tax Act sets the payroll taxes to fund these benefits. *Hisquierdo*, 439 U.S. at 574.[4] The payroll taxes are imposed on both the railroad employer and employee. *Id.* They are divided into Tier I and Tier II taxes and are measured by the amount of the employee's "compensation." *See* 26 U.S.C. § 3201 (employee rate

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[2] *See, e.g.*, 45 U.S.C. § 231a(a)(1) (describing eligibility for both retirement and disability benefits); 45 U.S.C. § 231a(b) (describing eligibility for supplemental retirement benefits); 45 U.S.C. § 231b (computing benefits).

[3] *See* 45 U.S.C. § 352 (sickness benefits); 45 U.S.C. § 231a (disability benefits and occupational disability benefits). *See also Eichel v. New York Cent. R. Co.*, 375 U.S. 253, 255 (1963) (in negligence suit arising from workplace injury, the trial court properly excluded evidence that the employee was receiving an occupational disability annuity under the RRA).

[4] In its original form, the RRTA was known as the Carriers Taxing Act, 50 Stat. 435 (1937). Since 1946, it has been called the Railroad Retirement Tax Act.

of tax); 26 U.S.C. § 3221 (employer rate of tax).[5] The railroad employer withholds the payroll taxes from the employee's earnings and pays them over to the IRS. 26 U.S.C. § 3202(a). The employee does not take this money home. 26 U.S.C. § 7501; 26 C.F.R. § 31.3202-1.

These statutes are administered by two federal agencies. The Railroad Retirement Board (RRB), an independent agency within the executive branch, administers the benefit program under the Railroad Retirement Act. *See* 45 U.S.C. § 231f; 20 C.F.R. § 200.1(a)(3). The Internal Revenue Service (IRS) is assigned the responsibility of collecting revenues under the Railroad Retirement Tax Act. 26 U.S.C. § 7801; 20 C.F.R. § 200.1(a)(3). Congress vested the RRB with authority to work in coordination with the IRS to ensure that the railroad employers are properly paying the taxes that fund the benefit programs.[6]

Congress directed the Secretary of Treasury to "prescribe all needful rules and regulations for the enforcement of [Title 26]. . . ." 26 U.S.C. § 7805; *see also United States v. Correll*, 389 U.S. 299, 306–07 (1967).

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[5] For example, the employee payroll taxes in 2017 were: Tier I—6.2 percent (maximum earnings taxed is $127,200); Tier II—4.9 percent (maximum earnings taxed is $94,500).

[6] 45 U.S.C. § 231f(b)(6) (RRB has power to require all employers to furnish such information and records as shall be necessary for the administration of the Act); 45 U.S.C. § 231h (RRB may require employers to file compensation reports).

B. Statutory Definition of "Compensation"

The benefits and taxes under the railroad retirement scheme are predicated on the employee's "compensation." *See* 26 U.S.C. §§ 3201(a), (b) (employee rate of tax); 26 U.S.C. §§ 3221(a), (b) (employer rate of tax); 45 U.S.C. § 231b (computation of annuities).

"Compensation" is a defined term in both the RRA and RRTA.[7] At the outset in 1935, the taxing act defined "compensation" as "any form of money remuneration for active service *received by* an employee from a carrier, including salaries and commissions . . . ." Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (Aug. 29, 1935) (emphasis added).[8]

Beginning in 1937, Congress dropped the requirement of "active" service. *See* Carriers Taxing

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[7] The original 1934 Railroad Retirement Act used the term "compensation," without further definition. 48 Stat. 1283 (1934). After this Court declared that act unconstitutional, (*Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935)), Congress separated the taxing and benefit statutes. *See* Railroad Retirement Act of 1935, 49 Stat. 967, and the Carriers Taxing Act of 1935, 49 Stat. 974.

[8] The 1935 Act was enjoined as unconstitutional by a district court (*Alton Railroad Co. v. R.R. Retirement Bd.*, 16 F. Supp. 955 (D. D.C. 1936)), but that litigation was withdrawn after labor-management negotiations resulted in a memorandum of agreement, the principles of which became the Railroad Retirement Act of 1937.

Act of 1937, Pub. L. No. 174, § 1 (June 20, 1937).[9] Congress also changed the timing rules for when the taxes are assessed. *See id.* According to the Senate report, the new "phraseology makes clear that what is significant is that compensation has been *earned by* the employee, not that it has been *actually received* by him."[10] Through an "including" paragraph, Congress introduced special rules for payments made to an employee for lost time from work. The RRTA definition provided:

> The term 'compensation' means any form of money remuneration *earned by* an individual for services rendered as an employee to one or more employers . . . *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.*

26 U.S.C. § 1532(e) (Supp. V 1939) (emphasis added). The Railroad Retirement Act of 1937 contained identical language in its definition of compensation. 45 U.S.C. § 231(h) (Supp. V 1939).

In 1946, Congress added a second paragraph to the definition of "compensation." Pub. L. 572, § 1, 60 Stat. 722 (July 31, 1946). This new paragraph began by stating that an employer's payment through the

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[9] In its original form, the RRTA was known as the Carriers Taxing Act, 50 Stat. 435 (1937). Since 1946, it has been called the Railroad Retirement Tax Act.

[10] S. Rep. No. 818, 75th Cong., 1st Sess. 4 (1937), *reprinted in* 1939–2 C.B. 629, 632 (emphasis added).

employee payroll shall be deemed to be compensation for services rendered. *See id.* at § 2. 26 U.S.C. § 1532(e) (1946). In relevant part, it then stated:

> An employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to an *identifiable period of absence from the active service of the employer*, including absence *on account of personal injury* . . . .

26 U.S.C. § 1532(e) (1946) (emphasis added).[11] The RRA, as amended, contained identical language. 45 U.S.C. § 231(h) (1946).

In 1975, Congress moved from assessing taxes based on when money remuneration is *earned by* an employee to assessing taxes based on when he or she is *paid*. See Pub. L. 94-93 § 204 (Aug. 9, 1975).[12] Congress also removed the special rules for time-lost payments that were part of the "earned" concept added in 1937. *Id.* As revised, the first sentence of compensation in the RRTA stated: "The term 'compensation' means any form of money remuneration *paid to* an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e) (emphasis added).

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[11] It further provided that the total payment "shall be deemed" pay for time lost unless specifically apportioned to factors other than time lost. *Id.*

[12] This change from "earned" to "paid" had already been made in the RRA's definition of compensation when Congress completely restructured the RRA in 1974. *See* 45 U.S.C. § 231(h) (1974).

Congress amended the RRTA's definition of compensation in 1976, 1981, and 1982, making changes to the substantive rule and adding exclusions.[13] Congress left intact the references to time-lost payments in the second paragraph of the RRTA's definition of compensation.

In 1983, Congress shifted the definition of compensation from a monthly wage basis to an annualized wage basis. *See* Pub. L. 98-76, § 225 – Technical Amendments (Aug. 12, 1983). As part of this amendment, Congress removed the second paragraph in the RRTA's definition of "compensation" in its entirety. Congress inserted in its place rules about payments in excess of base compensation. *See id.* at § 225(a)(1).[14] This 1983 amendment removed the last references to pay for time lost in the RRTA's definition of compensation.

Today, the RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more

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[13] In 1976, for example, Congress excluded certain types of time-lost payments—*i.e.*, disability or sickness payments under an employer plan—from the definition of compensation. 26 U.S.C. § 3231(e)(1)(j) (1976). In 1981, Congress made changes to the second paragraph of the RRTA's definition of compensation to address the rules for retroactive payments. 26 U.S.C. § 3231(e)(2) (1981). *See also* Pub. L. 97-123, 1982-1 C.B. 314 (Jan. 1, 1982) (adding an exemption (4)(A) & (B) to the RRTA definition of compensation).

[14] Specifically, Congress inserted in a substitute provision that excludes compensation in excess of "applicable base," defines the applicable base, and provides for the applicability of successor employer provisions. *Id.*

employers." 26 U.S.C. § 3231(e) (Pet.App. 33a). The RRTA contains a detailed list of exclusions from the definition. *See id.* The RRA defines "compensation" as any form of "money remuneration paid to an individual for services rendered as an employee to one or more employers . . . including remuneration paid for time lost as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a). It further provides that an "employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury . . . ." 45 U.S.C. § 231(h)(2) (Pet.App. 41a.)

C. The Interpretations of Federal Agencies

The IRS administers the RRTA and has promulgated regulations defining compensation through its authority under 26 U.S.C. § 7805. Since 1938, the IRS regulation has consistently defined taxable "compensation" as "not confined to amounts paid or earned for active service but includ[ing] amounts earned or paid for periods during which the employee or employee representative is absent from the active service of the employer." 26 C.F.R. § 410.5 (1938). *Compare* 26 C.F.R. § 31.3231(e)-1(a)(3) (2017) (Pet.App. 46a-47a).

In 1994, the IRS proposed regulations that included the words "pay for time lost" in the definition of compensation. *Update of Railroad Retirement Tax Act Regulations*, 59 Fed. Reg. 66188, 66188-89 (Dec. 23, 1994). One commenter suggested deleting this language since pay for time lost had been removed in 1983 from the RRTA's definition of

taxable compensation. *Id.* In rejecting this suggestion, the IRS explained that the statutory amendments affected when time-lost payments were assessed, not whether such payment were included in compensation. *See id.* Thus, the IRS concluded that time-lost payments remained in the definition of "compensation." *See id.*; *see also* 2014 Instructions for IRS Form CT-1, Employer's Annual Railroad Retirement Tax Return (J.A. 35a) (explaining that compensation "includes pay for time lost as an employee").

The Railroad Retirement Board counts payments for time lost toward the employee's creditable service. It agrees with the IRS that the definition of taxable compensation under the RRTA should be construed similarly. (Pet.App. 18a; J.A. 68a, 75a.) As the Board explained in 2005, "[t]he Office has long recognized that in view of the substantial similarity between the definitions of compensation under the RRA and RRTA, it is desirable, absent controlling language to the contrary to treat payments to employees in the same fashion under both statutes."[15] Thus, the Railroad Retirement Board stated in 2008 that "[a]s with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act . . . ."[16]

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[15] U.S. Railroad Retirement Board Legal Opinion L-2005-25 at 2 (Dec. 2, 2005).

[16] U.S. Railroad Retirement Board, *Railroad Retirement Service Credits and Pay for Time Lost* at 1, 3 (May 2008). (J.A. 68a; *see also* J.A. 75a, 78a-79a.)

D. The Relevant Facts and Procedural History

The facts of this case are not in dispute. In 2013, plaintiff sued BNSF under the Federal Employers' Liability Act (FELA) to recover damages for work-related injuries. Plaintiff filed this action in Minnesota federal district court. His FELA case proceeded to trial. (Pet.App. 7a.) Following a trial, the jury returned a verdict in favor of plaintiff in the amount of $126,212.78. (Pet.App. 7a; J.A. 86a-88a.) The verdict included a line item of $30,000 in past lost wages. (Pet.App. 7a, 26a; J.A. 87a, 94a.) The district court entered the entire amount in judgment against BNSF. (Pet.App. 26a; J.A. 19a.)

BNSF filed a timely motion to amend or alter the judgment under Federal Rule of Civil Procedure 59(e). (Pet.App. 7a.) BNSF notified the court that it had paid to the IRS a total of $9990 in RRTA taxes, which consisted of the $3765 owed in payroll taxes by plaintiff and the $6234 owed in payroll taxes by BNSF for the lost wage payment. (Pet.App. 21a-23a, 29a.) BNSF submitted the RRB Form BA-4, along with an affidavit, showing that plaintiff had received four additional months of creditable compensation towards his retirement benefits for this time-lost payment. (J.A. 23a; Supplemental Appendix (SA) 4.) BNSF asked the district court to offset the judgment by $3765 to reflect plaintiff's share of taxes owed under the RRTA as a result of the lost wage award. (Pet.App. 29a.)

The district court agreed with BNSF that "FELA judgments for lost pay fall within the definition of 'compensation'" under the RRTA. (Pet.App. 29a.) However, the district court observed that personal

injury awards are exempt from income taxes under 26 U.S.C. § 104. (Pet.App. 30a.) The court believed that this exclusion for personal injury judgments should apply to the RRTA's definition of compensation as well. (Pet.App. 30a.) Accordingly, the court denied BNSF's motion for an offset.

BNSF appealed, and the United States filed an amicus brief in support of the appeal. Their briefs explained that the RRTA tax is imposed on "compensation"—a defined term in the RRTA—and that the IRS has interpreted this term to include pay for time lost. The briefs further explained that the district court was wrong to invoke 26 U.S.C. § 104, which is an exclusion applicable to a different statutory term (gross income) for a different tax (income tax). For over half of a century, the IRS has maintained that 26 U.S.C. § 104 has no bearing on the RRTA tax treatment for time lost.[17]

E. The Opinion of the Eighth Circuit

The Eighth Circuit affirmed the district court's decision in this case, though on different grounds. (Pet.App. 24a.) The court recognized that "damages for lost wages fit well within the definition of 'compensation'" under the IRS regulation, but it rejected this interpretation of the RRTA. (Pet.App. 19a-20a.) "[T]he RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" (Pet.App. 24a.)

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[17] *See* Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961); IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985).

The Eighth Circuit reasoned that the RRTA defines "compensation" as remuneration paid "for services rendered as an employee." (Pet.App. 20a.) The panel construed "services rendered" to mean "services that an employee actually renders, not to services that the employee would have rendered but could not." (Pet.App. 20a.) The panel acknowledged that this Court has construed, in the social security context, the concept of payment for services performed to encompass the entire employee-employer relationship. (Pet.App. 19a-20a.)[18] However, the panel found this precedent was not applicable to the RRTA and thus gave it no weight. (Pet.App. 20a.) The Eighth Circuit concluded that "damages for lost wages do not fit within the plain meaning of the RRTA" and that the IRS "regulations providing to the contrary receive no deference under *Chevron* . . . ." (Pet.App. 20a, 24a.)

The Eighth Circuit acknowledged that the RRA defines compensation to include pay for time lost. "[B]ecause the RRA expressly considers pay for time lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits." (Pet.App. 21a.) The court, however, observed that these statutes contained "linguistic" differences: "That Congress expressly included pay for time lost in the RRA's definition of 'compensation' yet omitted it from the RRTA's definition suggests

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[18] *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365–66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014).

that Congress did not intend the RRTA to include pay for time lost." (Pet.App. 21a.) According to the court, the statutory history "confirms" that the linguistic differences are "intentional." (Pet.App. 21a.) Thus, the Eighth Circuit ruled that the lost-wages award was not subject to payroll taxes under the RRTA. (Pet.App. 23a-24a.)

BNSF filed a timely petition for rehearing and rehearing en banc. BNSF explained that the panel's ruling conflicted with decisions of other state and federal courts. The Eighth Circuit denied rehearing.

SUMMARY OF ARGUMENT

In its last Term, this Court addressed an issue of interpretation of the term "compensation" in the RRTA. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067 (2018). The Court looked to the immediate text, the broader context, and the contemporaneous views of the IRS. In this case, each of these tools of interpretation points to the same result: pay for time lost is taxable compensation under the RRTA.

First, Congress chose to define compensation broadly as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e). This Court has interpreted similar language–"service . . . performed"–and concluded that it covers lost wages regardless of whether services have been actually performed. *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358 (1946); *United States v. Quality Stores*, 134 S. Ct. 1395 (2014). The Eighth Circuit restricted the scope of compensation to services "actually" performed, but there is no such restriction in the

statutory language. Worse still, the Eighth Circuit's interpretation would render other parts of the definition superfluous. Congress carefully crafted exclusions for only certain types of time-lost payments from the definition of compensation. The Eighth Circuit's interpretation conflicts with that deliberate decision.

Second, the meaning of "compensation" in the RRTA is clarified by the more detailed definition of the same term in the companion statute, the RRA. That statute was enacted in the same week, addressed the same subject, and used the same term ("compensation"). Both statutes have the same key definition of compensation ("any form of money remuneration paid to an individual for services rendered as an employee"), but the RRA discusses an example of such compensation ("including remuneration paid for time lost as an employee"). Because the two statutes should be read *in pari materia*, that illustration of the meaning of compensation should apply to both. This assures that payments used to compute benefits will also be used to compute taxes.

Third, the history confirms that Congress intended to have equivalence in the benefits and taxing provisions. It shows that deletion of the time-lost language from the RRTA's definition of "compensation" in 1975 was not intended to exempt such payments from taxation, but to serve another purpose. The time-lost illustration was initially inserted into the statute to address the problem of when pay for time lost was "earned" under the statute. When the statutory standard was changed

from "earned" to "paid," it was no longer necessary to define when lost pay was earned in the RRTA. The legislative history of the 1975 amendment shows that Congress made this change so that the procedures for benefits and taxes would be consistent. Both courts and the IRS examined the history shortly after the 1983 amendment and found no intent to change the substantive rule with regard to pay for time lost.

Based on all of these circumstances, it is clear that the RRTA subjects pay for time lost to taxation. If there were any doubt, the views of the responsible agencies would be helpful in resolving it. The IRS regulations have provided for 80 years that "[t]he term [compensation] is not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee . . . is absent from active service." 26 C.F.R. § 410.5 (1938). The regulation in effect today specifically refers to pay for time lost in the definition. 26 C.F.R. § 31.3231(e)-1(a)(4) (Pet.App. 18). The Railroad Retirement Board takes the same view, and so advises railroad employees. For years, these federal agencies have distributed pamphlets and forms to the railroads and their employees explaining that pay for time lost is taxable under the RRTA. Thus, every available tool of interpretation confirms that "compensation" under the RRTA includes pay for lost time.

With the meaning of "compensation" clear, Respondent Loos has taken a different tack. He insists that BNSF's payment of lost wages falls under an exclusion—26 U.S.C. § 104(a)(2). Section

104, however, is an exclusion from a different term ("gross income") for purposes of a different tax (income tax). Congress chose the term "compensation" as the base for measuring a railroad employee's tax obligations under the RRTA and separately defined that term. Congress expressly incorporated only certain exclusions applicable to gross income into the definition of "compensation." Significantly, Section 104 is not one of them. That omission should be respected. Thus, Respondent's argument about the Section 104 exclusion fails because it is contrary to the statutory text, structure, and history.

ARGUMENT

I. The RRTA's Definition Of Taxable Compensation Includes Pay For Time Lost

The threshold issue before this Court is whether the RRTA's definition of taxable compensation includes pay for time lost. The statutory text, context, and history all show that Congress intended to include payments for time lost in taxable compensation under the RRTA. It is therefore hardly surprising that virtually every court to consider this issue has answered in the affirmative.

A. The Statutory Text

Statutory interpretation begins with the text. *See Wisconsin Cent.*, 138 S. Ct. at 2070. The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e) (Pet.App. 33a). Payments for time lost fit comfortably within this definition.

Payments for lost wages are undoubtedly a form of money remuneration. Remuneration has long been understood as synonymous with compensation or repayment.[19] Further, Congress prefaced "money remuneration" with the broadening words "any form." 28 U.S.C. § 3231(e). "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *United States v. Gonzalez*, 520 U.S. 1, 5 (1997). The court of appeals thus found that "damages for lost wages are a 'form of money remuneration paid to an individual' . . . ." (Pet.App. 19a.)

And money payments for time lost from work as an employee are for "services rendered as an employee ...." 26 U.S.C. § 3231(e). These payments arise from the employment relationship. (J.A. 89a, 92a-94a; SA1, 4.) The Eighth Circuit, however, advanced a different view. The court found that "the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not." (Pet.App. 20a.)

In fact, the language is not so plain. Over a half a century ago, this Court construed a similar phrase—

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[19] *See, e.g.*, Black's Law Dictionary 1537 (3d ed. 1933) (defining "remuneration" as "reward, recompensate, salary"); Webster's Seventh New Collegiate Dictionary 1921 (1969) (defining "remunerate" as "to pay an equivalent to an equivalent to for a service, loss, or expense: recompense" (capitalization omitted); 8 The Oxford English Dictionary 439 (1st ed. 1933) (defining "[r]emuneration" as "[r]eward, recompense, repayment; payment, pay").

"any service . . . performed . . . by an employee for his employer"—to cover an award for lost wages. *See Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358 (1946). In *Nierotko*, the employee obtained a "back pay" award based on a wrongful discharge claim and then requested credit from the Social Security Board for the time lost on his social security account. *See id.* at 359–60 60. The Board refused because the employee had not performed any actual service during this period. *Id.* at 365.

In reversing, this Court recognized that the definition of "wages" in the Federal Insurance Contributions Act (FICA) had two parts. First, the term "wages" was defined to mean "all remuneration for employment . . . ." *Id.* at 365, quoting 42 U.S.C. § 402(a). Second, the term "employment" was defined as "any service, of whatever nature, performed . . . by an employee for his employer . . . ." *Id.* at 363–65, quoting 42 U.S.C. § 402(a). It was the second part of the definition—service performed—that was at issue. *Id.* at 366. This Court rejected the Social Security Board's interpretation, explaining:

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee.

Id. at 365–66 (emphasis supplied). The Court found the statutory language was so clear that it overruled the administrative interpretation. *See id.* at 369.

In 2014, this Court again read the "service performed" phrase broadly. *See United States v. Quality Stores*, 134 S. Ct. 1395 (2014). There, the issue was whether severance payments to terminated employees constituted remuneration for services performed under FICA. *Id.* at 1398. Reiterating that the service performed phrase is not limited to work actually done, the Court held that such payments were taxable wages under FICA. *Id.* at 1400, 1405. Thus, *Nierotko* and *Quality Stores* support a broad reading of the "service rendered" phrase in the RRTA to encompass an award for lost wages regardless of whether the employee actually worked during the time period.[20]

The Eighth Circuit offered an alternative interpretation of the "services performed" phrase. According to the court, the "plain language of the RRTA refers to services that an employee *actually* renders, not to services that the employee would

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[20] The Eighth Circuit distinguished *Nierotko* and *Quality Stores* because the FICA imposes taxes on "employment" instead of "services." (Pet.App. 20a.) But FICA defines "employment" to mean "any service . . . performed . . . ." 26 U.S.C. § 3121(b) ("the term 'employment' means any service, of whatever nature, performed . . . ."). The critical point here is not any difference in the use of the words "employment" and "services" but in the similarity of the *underlying* defining language—both terms turn on the concept of "service performed."

have rendered but could not." (Pet.App. 20a) (emphasis added). The most obvious problem with this construction is that "the word 'actually' does not appear there in the 'plain text' of that Code section." *See Norfolk S. Ry. Co. v. Williams*, No. 2160823, __ So. 3d __, 2018 WL 2995699, at *6 (Ala. App. June 15, 2018). This Court "ordinarily resist[s] reading words . . . into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). This is particularly important here where Congress had previously defined compensation as "active service" but dropped this requirement from the statute in 1937.

The injection of this requirement back into the statute is problematic enough, but the Eighth Circuit would add words to the statute only to render other portions superfluous. The breadth of a statute is "reinforce[d]" by statutory exceptions that would be "superfluous" if the provision was given a narrower interpretation. *Am. Bank & Trust Co. v. Dallas Cnty.*, 463 U.S. 855, 863–864 (1983). The RRTA contains an exhaustive list of express exclusions from the definitional term "compensation." (Pet.App. 33a-40a.) The first exclusion is for payments made to an employee under a plan or system "established by the employer . . . on account of sickness or accident disability . . . ." 26 U.S.C. § 3231(e)(1)(i) (Pet.App 33a.) This exclusion has been in the RRTA since 1976—the year after Congress removed the time-lost language from Section 3231(a)(1). 26 U.S.C. § 3231(e)(1)(i) (1976); Pub. L. 94-547 (Oct. 18, 1976). In 1982, Congress added further exclusions for disability benefits received under the RRA and for sickness benefits under the Railroad

Unemployment Insurance Act when such sickness is the result of an on-the-job injury. 26 U.S.C. § 3231(e)(4)(A), (B) (1982); Pub. L. 97-123 (Jan. 1, 1982); Pet.App. 37a-38a. These exemptions would be unnecessary were time-lost payments not within the definition of compensation. Because the statute as redrafted by the Eighth Circuit renders these exemptions superfluous, it should be rejected. *See Quality Stores*, 134 S. Ct. at 1400 (declining to adopt a narrow reading of the "services performed" language in FICA's definition of wages when doing so would render an exemption superfluous).

Given the statutory text, it is unsurprising that virtually every court to consider the issue has concluded that pay for time lost comfortably fits within the statutory definition of compensation.[21] Thus, on the basis of the statutory language alone,

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[21] *See, e.g.*, *Norfolk S. Ry. Co. v. Williams*, 2018 WL 2995699, at *6–8; *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511 (6th Cir. 2009); *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 25–30 (Pa. Super. Ct. 2016); *Phillips v. Chicago Central & Pacific R.R.*, 853 N.W.2d 636, 650–51 (Iowa. 2014); *Cowden v. BNSF Ry. Co.*, No. 4:08-cv-01534, 2014 WL 3096867, at *2 (E.D. Mo. July 7, 2014); *Heckman v. Burlington N. Santa Fe Ry. Co.*, 837 N.W.2d 532, 539–42 (Neb. 2013); *Cheetham v. CSX Transp.*, No 06-cv-704, 2012 WL 1424168 (M.D. Fla. Feb. 13, 2012); *Vodden v. BNSF Ry. Co.*, No. 27 CV-11-18376, 2012 WL 7150849 (Minn. Dist. Ct. Dec. 19, 2012); *Nielsen v. BNSF Ry. Co.*, Case No. 0807-10580, 2012 WL 12526344 (Oregon Cir. Ct. Mar. 5, 2012). *But see Mickey v. BNSF Ry Co.*, 437 S.W.3d 207, 214–15 (Mo. 2014) (noting that the RRTA's broad definition of "compensation" does not specifically mention pay for time lost); *Munoz v. Norfolk S. Ry.*, 2018 IL App (1st) 171009 (Ill. App. 2018) (following the *Loos* decision at issue here).

this Court should hold that pay for time lost is included in the definition of taxable compensation under the RRTA.

B. The Statutory Context

That's not all. "The broader statutory context points to the same conclusion the immediate text suggests." *Wisconsin Cent.*, 138 S. Ct. at 2071.

The meaning of "compensation" in the RRTA is clarified by the illustrative examples of that term in the companion statute, the RRA.[22] Both statutes employ the same term "compensation" and provide the same definition of that word: "The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a); 26 U.S.C. § 3231(e)(1) (Pet.App. 33a).

The RRA's definition of "compensation" then continues: "*including* remuneration paid for time lost as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a) (emphasis added). The use of the word "including"—as opposed to "and"—makes clear that pay for time lost is illustrative of the type of payment covered. "[T]he term 'including' connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). It

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[22] *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (statutory terms are often "clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear").

does not impose a new, additional limitation. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (rejecting the argument that "including" means "and" or "as well as").[23] Thus, here, the "including" phrase in the RRA introduces only an example of the type of payment for services rendered covered by the definition.

The RRA, in turn, makes clear that pay for time lost includes absence on account of a personal injury. "An employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to identifiable period of absence from the active service of the employer, *including* absence on account of personal injury . . . ." 45 U.S.C. § 231(h)(2) (Pet.App. 42a) (emphasis added). Thus, the RRA demonstrates that the phrase "services rendered" is broad enough to encompass pay for time lost due to a personal injury.

This guidance is particularly valuable because the RRA and RRTA address the same subject matter. Congress enacted these two statutes "simultaneously" in 1937 to "implement a program by which pensions are provided out of funds derived from taxes upon carriers and their employees." *Shattuck v. Gallagher*, 218 F.3d 428, 429–30 (6th

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[23] According to dictionaries and English-usage treatises, "to include" means "to contain as a part or member, or among the parts and members, of a whole," and it suggests "the component items are not being mentioned in their entirety" and "the list is merely exemplary." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 132 (2012) (quotations and citations omitted).

Cir. 1955). "[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). "The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Id.*

Because the RRA and RRTA represent different sides of the same coin, the lower courts often look to the one when interpreting the other. *See Atl. Land & Improvement Co. v. United States*, 790 F.2d 853, 856 & n.5 (11th Cir. 1986). "The RRA and the RRTA are inextricably interconnected because the latter funds the former." *Phillips v. Chicago Cent. & Pacific R.R. Co.*, 853 N.W.2d 636, 649 (Iowa. 2014). "Indeed, without the benefits provided for in the RRA, there would be no need for the taxing provisions of the RRTA." *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 25–30 (Pa. Super. Ct. 2016). Their similarly worded provisions "should be identically construed and applied." *Universal Carloading & Distrib. Co. v. Pedrick*, 184 F.2d 64, 66

(2d Cir. 1950).[24] The two federal agencies charged with administering these statutes agree.[25]

This holistic approach is especially appropriate in interpreting the meaning of "compensation." Classification of a payment as "compensation" triggers benefits for the employee under the RRA. Even with short periods of lost time, an employee increases his eligibility for retirement benefits by treating the payments as compensation under the RRA. The amount of his benefit increases with each additional month of creditable service. 45 U.S.C. § 231b(b). Respondent Loos received four months of additional credit toward his service time for the time lost as a result of his personal injury. (Supp. App. 3.) Giving the same meaning to "compensation" under the RRTA and the RRA assures that the time-lost dollars that enhance benefits will be taxed at the same rate as other dollars increasing benefits. Thus, treating the RRA definition as a further elaboration of the RRTA definition will ensure adequate funding for the retirement benefits the employees will receive. "Because an employee's RRA benefits

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[24] *See also Livingston Rebuild Center v. R.R. Retirement Board*, 970 F.2d 295, 299 (7th Cir. 1992) (differing interpretations of the definition of employer under the RRA and RRTA produce "a muddle"); *Carland Inc. v. United States*, No. 93-0277-CV-W-2, 1995 WL 218576, at *4 n.3 (W.D. Mo. Feb. 14, 1995); *Missouri Pac. Truck Lines, Inc. v. United States*, 3 Cl. Ct. 14 (1983), *aff'd*, 736 F.2d 706 (Fed. Cir. 1984).

[25] *See* IRS Rev. Rul. 74-121 (IRS RRU), 1974-1 C.B. 300, 1974 WL 34878; U.S. Railroad Retirement Board Legal Opinion L-2005-25 at 2 (Dec. 2, 2005).

increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under the RRTA to pay for those benefits." *Liberatore*, 140 A.3d at 29.

The court of appeals emphasized that Congress included "pay for time lost" in the RRA yet omitted it from the RRTA. "[T]his suggests that Congress did not intend the RRTA to include pay for time lost." (Pet.App. 21a). But Congress prefaced the "pay for time lost" language in the RRA with the word "including": "The term 'compensation' means any form of money remuneration paid to an individual for services rendered . . . *including* remuneration paid for time lost as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a) (emphasis added). Because both statutes use the same definition—"any form of money remuneration paid to an employee for services rendered"—the RRA's illustration of the type of payment covered by this definition is relevant to interpreting the RRTA.

Thus, the statutory context gives clarity to the RRTA's definition of compensation. It shows that Congress viewed pay for time lost "as a subset of remuneration earned by an individual for services rendered as an employee." *Norfolk S. Ry. v. Williams*, 2018 WL 2995699, at *6.

C. The Statutory History

The history of the RRTA also demonstrates Congress's intent that payments for time lost be considered "compensation." *Wisconsin Cent.*, 138 S. Ct. at 2071–72.

First, the definition of compensation was initially limited to remuneration "received" for "active service." Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (Aug. 29, 1935). In 1937, Congress dropped the word "active" from the definition. *See* Carriers Taxing Act of 1937, Pub. L. No. 174, § 1 (June 20, 1937). This reflected that Congress did not believe active service was a requirement to the definition of compensation.

Second, when Congress added in the "services rendered" phrase into the definition, Congress also added the illustrative example of pay for time lost. Thus, for the next several decades, the first paragraph of the RRTA's definition of compensation contained the broad definitional language–"any form of money remuneration earned . . . for services rendered"–followed by the phrase "including remuneration paid for time lost . . . ." 26 U.S.C. § 3231(e). And from 1975 to 1983, the RRTA's definition of compensation continued to refer to payments for time lost in the second paragraph of the defined term compensation. Thus, for more than four decades, the definition of compensation in the RRTA included pay for time lost as a subset of payments covered by the "services rendered" definition. *Norfolk S. Ry. v. Williams*, 2018 WL 2995699, at *7. This history confirms that the "services rendered" language is broad enough to include pay for time lost.

Third, while Congress removed the last references to time-lost in 1985, it did not change the key statutory definition of the term compensation. Those definitions remained the same in both the

RRTA and RRA. As courts have explained, it is reasonable to infer that Congress does not intend a substantive change when it deletes an example but retains the same substantive definition.[26] If Congress intended to exclude all time-lost payments after 1983, it would have added those payments as exclusions from the definition. The RRTA itemizes an exhaustive list of exclusions from the term compensation, but time-lost payments for personal injury are not among them. 26 U.S.C. § 3231(e) (Pet.App. 33a-40a).

Fourth, the legislative history confirms that, even after the time-lost references were removed, Congress intended consistency in the benefits and taxing procedures. The time-lost language was introduced in 1937 primarily to dictate *when* a time lost payment was earned. When the statutory test was changed from "earned" to "paid," this language was no longer needed.[27]

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[26] *See, e.g., Architectronics, Inc. v. Control Sys.*, 935 F. Supp. 425, 441 (S.D.N.Y. 1996) ("That a clause has been deleted from a draft of a statute, without more, does not mean that the polar opposite of the clause was enacted, particularly when the clause in question did no more than provide a list of examples that did not purport to be exhaustive."); *A. Brod, Inc. v. SK & I Co.*, 998 F. Supp. 314, 322 (S.D.N.Y. 1998) ("all indications are that Congress, despite deleting the examples of non-equivalence, viewed those examples—including breaches of trust—as illustrative of non-equivalent, non-preempted state law rights").

[27] This statutory history is explained in depth in a 1993 IRS Technical Advice Memorandum, which is attached as an addendum to this brief. (Addendum 1a-20a). This TAM is also available in its entirety at 1993 WL 187036.

Specifically, in 1937, Congress moved the timing of taxation from when remuneration is "received" to when remuneration is "earned." S. Rep. No. 818, 75th Cong., 1st Sess. 4 (1937), *reprinted in* 1939–2 C.B. 629, 632. Under this standard, pay for time lost presented its own unique difficulties because the employee is paid at a different time than when the remuneration would have been earned. This required the IRS to have special rules assigning a time of assessment to pay for time lost. (Addendum at 7a.) Hence, the statutory language directing the treatment of pay for time loss was added. (*Id.*) The phrase "including remuneration paid for time lost" served as an introduction to this topic and the remaining phrase stated the rule. Those rules were necessary when the statute focused on the time in which the remuneration was "earned" but were less necessary, if at all, when the statute was triggered when the remuneration was paid. (Addendum at 7a, 13a).

In 1975, Congress again changed the standard – this time from "earned" to "paid." It then began to jettison the language dealing with the timing of pay for time lost. Since Congress was removing the special timing rule from the RRTA definition, the introductory phrase "including remuneration paid for time lost" was no longer needed. (Addendum at 7a-8a, 13a).

Senator Long, Chairman of the Senate Finance Committee, explained the reasons for the 1975 amendment: "The amendment deals with the method of assessing railroad retirement payroll taxes." 121 Cong. Rec. 26759 (Aug. 1, 1975). As the

Senator explained, due to an intervening revenue ruling, the taxing basis was inconsistent with the basis under which the Railroad Retirement Board credits compensation for benefit purposes. *Id.* Thus, the amendment "will make the two procedures consistent in that for both tax assessment and benefits computation purposes wages will be considered to be earned as of the period when they are actually paid ...." *Id.* *See* 121 Cong. Rec. 24479 (July 24, 1975).

Congressman Corman, who introduced the bill in the House, similarly explained that the bill was designed to make the procedures identical for computing benefits and taxes. *See* 121 Cong. Rec. 27014 (Aug. 1, 1975). In this context, it is inconceivable that Congress intended to reject taxes altogether for time-lost pay while including such payments in calculating the benefits.

This is confirmed by an exchange between Representatives Conable and Stieger (another sponsor of the bill) on the House floor that same day:

> Mr. CONABLE. .... Is it not true that this also does not act as a precedent in other areas, it relates only to Railroad Retirement and **will not cause serious problems beyond the $10,000 revenue loss, which is estimated to be the total impact on the Treasury?**
>
> Mr. STIEGER. It is not a precedent. It is only an administrative change.

121 Cong. Rec. 27014 (Aug. 1, 1975) (emphasis added). Congressman Stieger reiterated: "The change is one in which it will be easier for the railroads to keep their books *** **The estimated revenue loss is something in the range of $10,000.**" *Id.* (emphasis added).

The reference to a $10,000 revenue loss is a telltale sign of the type of change Congress thought it was making—a minimal adjustment in the timing of the taxed compensation, not an exclusion of all awards for time lost. It is inconceivable that Congress could immunize all pay for time lost from RRTA taxes and expect only a $10,000 revenue loss. In 2016 alone, the railroads paid out at least $1.9 billion in such benefits, which were subject to railroad retirement taxes.[28] In addition, with over 4000 railroad employee on-the-job incidents each year, the total FELA payments each year is in the hundreds of millions of dollars. This case ***alone*** concerns payroll taxes of $9990 on lost pay.

In 1983, Congress deleted subsection 2 in a technical amendment, but this technical amendment had a different purpose. It was enacted to shift the definition of compensation from a monthly wage base to an annualized wage base. H. Rep. No. 98-30, 98th Cong., 1st Sess. p. 21 (1983). Thus, in 1983, Congress removed subsection (2) in its entirety, including the portions addressing the timing of payments other than pay for time lost. *Id.* The

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[28] Amicus Brief of the Association of American Railroads in Support of Certiorari, at 3 (filed Feb. 26, 2018).

Committee Report explained that "compensation would be taxed when it is paid to the employee," *i.e.*, employees could no longer elect to deem payment in the period in which the compensation was earned. *Id.* at 29. The 1983 Act's legislative history does not provide even the remotest indication that the amendment intended to exclude time-lost payments.

Contemporaneous views confirm this reading of the statutory history. In the wake of the 1983 amendments, courts examined the history and concluded that Congress did not intend to exclude pay for time lost from the RRTA's definition. "Nothing in the legislative history indicates that Congress intended to change the substantive definition of 'compensation.'" *Chi. Milwaukee Corp. v. United States*, 35 Fed. Cl. 447, 455 & n.6 (1996). "When considering the statutory language and pertinent legislative history . . . , it is apparent that the intent of the [1975] amendment" was to change the *timing* rules for when the taxes were assessed. *Atchison, Topeka & Santa Fe Ry. v. United States*, 628 F. Supp. 1431, 1437 (D. Kan. 1986). "[T]he legislative history of these amendments ... reveals that the 1975 amendment was intended solely to clarify that the RRTA tax was assessed to the extent and at the rate applicable when paid, rather than when earned, as has been the case prior to 1975...." *Milwaukee Corp. v. U.S.*, 35 Fed. Cl. at 455 & n.6. Its purpose was to change the timing rules for ***when*** (not whether) to assess payroll taxes. *See id.; see also Phillips*, 853 N.W.2d at 641 n.2, 646-47, 649-50.

The history shows that Congress deleted the rules bearing on the timing of pay for time lost, but did not

intend to exclude this form of money remuneration from compensation taxable under the RRTA.

D. The Longstanding IRS Regulations Are Consistent With The Statutory Text, Context, and History

Given the text, context, and history, the RRTA is unambiguous in including pay for time lost within taxable compensation. Even assuming the language were ambiguous, the longstanding administrative interpretation confirms congressional intent to include pay for time lost.

Here, there are two agencies with responsibility for administering the railroad retirement system and both interpret the term "compensation" in the RRTA as encompassing FELA awards for time lost.

The IRS has promulgated a regulation defining "compensation" to include "pay for time lost." 26 C.F.R. § 31.3231(e)-1(a)(4) (Pet.App. 18). The regulation further provides that the term compensation "is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer." 26 C.F.R. § 31.3231(e)-1(a)(3) (Pet.App. 18). The IRS is charged with promulgating rules and regulations for the enforcement of Title 26. 26 U.S.C. § 7805; *Correll*, 389 U.S. at 306-07.

This IRS interpretation is longstanding. Immediately after the passage of the taxing act in 1937, when Congress dropped the requirement of "active" service found in the preceding statute, the IRS promulgated a regulation that provided: "The

term [compensation] is not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee . . . is absent from active service." 26 C.F.R. § 410.5 (1938). A version of this regulation has remained in effect, without interruption, for the past eighty years. *See* 26 C.F.R. § 410.5 (1947) ("The term 'compensation' is not confined to amounts earned or paid for active service, but includes amounts earned or paid for an identifiable period during which the employee is absent from the active service of the employer."); 26 C.F.R. §31.3231(e) – 1 (b) (2) (1956) (same). The agency's longstanding interpretation is consistent with the statutory history, in which Congress eliminated the reference to "active service" in the 1937 amendment and thus embraced a definition of compensation that included pay for time lost.

In 1994, the IRS specifically confirmed that the term "compensation" continued to include pay for time lost. It proposed a regulation "providing that compensation includes payments for time lost." 59 Fed. Reg. 66188 (Dec. 23, 1994). A commenter suggested deleting this language in light of the 1983 statutory changes. The IRS rejected this suggestion, explaining that the 1983 amendment changed "[t]he inclusion of items to a 'paid basis' from an 'earned basis' . . . ." *Id.* . . "The legislative history does not indicate that Congress intended to exclude payments for time lost from compensation." *Id.* Thus, the IRS promulgated a regulation that specifically identifies pay for time lost as covered by "compensation." 26 C.F.R. § 31.3231(e)-1(a)(4). That regulation remains in effect today, some 24 years later. Congress

amended the RRTA's definition of compensation in 1996, 2000, 2001, 2003, and 2004 but did not overrule the agency interpretation.

The IRS's interpretation is reasonable. It aligns compensation for tax purposes with compensation for benefits purposes. The court of appeals expressly acknowledged that the idea "that the RRTA should tax what the RRA uses to calculate benefits makes sense as a statutory scheme." Pet.App. 23a. As a permissible interpretation of the statute, it is easily entitled to deference. *See Mayo Found. v. United States*, 562 U.S. 44, 52–53 (2011); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("If the agency's answer is based on a permissible construction of the statute, that is the end of the matter.").

In any event, the agency is entitled to a strong measure of deference under traditional standards. "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charted with its administration." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). "This is especially so where Congress has re-enacted the statute without pertinent change." *Id.* For 80 years, through multiple revisions of the statute, the IRS has maintained that compensation does not require active service but will also encompass "amounts earned or paid for an identifiable period during which the employee is absent from the active service of the employer." 26 C.F.R. § 410.5 (1938). This interpretation was made contemporaneously with the enactment of the statute, *see Norwegian Nitrogen Products Co. v. United States*, 288 U.S.

294, 315 (1933), preserved through various congressional amendments, and continuously made public through a binding regulation. In these circumstances, it is entitled to great weight. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) ("Of particular relevance is the agency's contemporaneous construction which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.'") (citation omitted).

Further, the Railroad Retirement Board has taken the same position, and publicized it throughout the rail industry. For example, in a 2008 publication, *Railroad Retirement Service Credits and Pay for Time Lost*, the Board addressed the question: "Is pay for time lost subject to railroad retirement tier I and tier II payroll taxes?" (J.A. 68a.) The Board answered: "Yes. As with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act . . . ." (J.A. 68a.) *Accord Pay for Time Lost From Regular Railroad Employment* (2015) ("Pay for time lost is considered compensation under the Railroad Retirement Tax Act. Thus, an employer is required to withhold and pay the employment taxes due on pay for time lost.") (J.A. 70a, 75a). The principle that pay for time lost is taxable just as it is creditable is not secret law, but a longstanding tenet of the railroad retirement system.

II. There Is No Exemption In The RRTA For Lost Wages Due To A Personal Injury

Respondent Loos has argued that his damage award is exempt from Railroad Retirement taxes under 26 U.S.C. § 104 ("Section 104"). The Supreme

Court of Missouri agreed with this interpretation. *See Mickey v. BNSF Ry Co.*, 437 S.W.3d 207, 214–15 (Mo. 2014). This argument fails for the same reason – it is inconsistent with the statutory language, context and history of the RRTA.

A. Congress Did Not Identify Section 104 As An Exclusion From The RRTA

The most authoritative guide to congressional intent is the text of the statute. *See Wisconsin Central*, 138 S. Ct. at 2070. Here, nothing in Section 104 asserts an exemption from the RRTA. And nothing in the RRTA asserts that Section 104 will provide an exemption. There is no language supporting Respondent's theory. *Norfolk S. Ry. Co. v. Williams*, 2018 WL 2995699, at *10 ("We have not been directed to any provision of Title 26 that indicates that the personal-injury exclusion applies to RRTA taxes.").

On its face, Section 104 does not provide an exclusion from the RRTA. Section 104 provides an exclusion from a different term (gross income) for purposes of a different statute (income tax). Section 104 is found in Part III of Subchapter B of the Internal Revenue Code, entitled "Items specifically excluded from gross income." Section 104 states that "gross income does not include . . . the amount of any damages received . . . on account of personal physical injuries or physical sickness . . . ." 26 U.S.C. § 104(a)(2). It is one of approximately 40 provisions identifying exclusions from "gross income." Gross income is a defined term (26 U.S.C. § 61) used in the definition of "taxable income." 26 U.S.C. § 63(a).

Rather than relying upon "gross income," the RRTA and RRA use the term "compensation," with its own elaborate definition. 26 U.S.C. §§ 3201, 3232(a), 3231(e). "The use of different terms within related statutes generally implies that different meanings were intended." *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002) (citation and quotation omitted).

For its part, the RRTA does not incorporate the Section 104 exclusion in its definition of "compensation." Congress had ample opportunity to incorporate that term, but chose not to do so. When Congress enacted the RRTA in 1937, the exclusion for personal injury damages had been on the books since 1918. *See* Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066. That Act stated: "for purposes of this title . . . the term 'gross income' . . . [d]oes not include . . .the amount of any damages received whether by suit or agreement on account of such injuries or sickness." *Id.*

When Congress passed the RRTA in 1937, it chose not to incorporate this exclusion. In fact, Congress affirmatively stated that taxable "compensation" for purposes of that Act meant "money remuneration earned by an individual for services rendered . . . *including remuneration paid for time lost as an employee.*" 26 U.S.C. § 1532(e) (Supp. V 1939). In 1946, Congress made this point even more clear when it amended the RRTA to provide:

> An employee shall be deemed to be paid, "for time lost" the amount he is paid by an

> employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury. . . . If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost.

60 Stat. 725. In light of this language, it is impossible to conclude that Congress saw Section 104 as creating an exclusion for damages based on personal injury.

The lack of any congressional direction to exclude personal injury awards from the RRTA is particularly striking because Congress did choose to incorporate a number of exclusions from "gross income" into the definition of "compensation" under the RRTA. These include the following:

RRTA Section	Subject	Income Tax Exclusion	Date Added
§ 3231(e)(5)	Employee achievement awards	§74(c)	1984
§ 3231(e)(5)	Amounts received under Federal or State student loan forgiveness	§108(f)(4)	1984
§ 3231(e)(5)	Qualified scholarships	§117	1984
§ 3231(e)(5)	Fringe benefits	§132	1984
§ 3231(e)(6)	Employer-provided educational assistance	§127	1984
§ 3231(e)(9)	Value of meals and lodging furnished by employer	§119	1989
§3231(e)(10)	Medical savings account contributions	§106(b)	1996
§3231(e)(11)	Employer contributions to health savings accounts	§106(d)	2003
§3231(e)(f)	Qualified stock options	§422(b) and §423(b)	2004

Significantly, when Congress intended to incorporate an exclusion from the definition of "gross income," it did so *expressly*. As the table indicates, references in the RRTA to the exclusions from gross income were added in 1984, 1989, 2003 and 2004. However, at no time did Congress designate Section

104 as an exclusion that would apply to the RRTA's definition of compensation. "The fact that ... Congress provided specific exemptions ... is evidence that Congress did not intend to recognize further exemptions ...." *United States v. Bess*, 357 U.S. 51, 57 (1958). *See also Elgin v. Dep't of Treasury*, 567 U.S. 1, 13 (2012) (when "Congress decline[s] to include an exception," that "indicates that Congress intended no such exception").

Here, Congress not only provided specific exemptions to the definition of "compensation," but chose the exemptions from the income tax that would be applicable under the RRTA, and specifically identified them as such. Despite multiple amendments adding exclusions to the definition of "compensation," Congress did not select Section 104(a) for that role.

Moreover, the language of the RRTA specifically *included* payments on account of personal injury for substantial periods of time. This contradicts any notion that Section 104 could extend to the RRTA. As one court noted:

> As noted above, the 1970 version of 26 U.S.C. § 3231(e)(1) specifically provided that compensation taxable under the RRTA included pay for time lost, and the 1970 version of 26 U.S.C. 3231(e)(2) specifically provided that pay for time lost included pay for absence on account of personal injury. If Congress intended the personal-injury exclusion to apply to RRTA taxes, it would not have specifically provided in the 1970 version of the RRTA that compensation

> taxable under the RRTA included pay for absence on account of personal injury.

Norfolk So. Ry. v. Williams, 2018 WL 2995699, at *4. The use of broad language in the definition of compensation confirms that Congress did not intend an exclusion for personal injury under Section 104. The RRTA is not ambiguous.

Even if there were an ambiguity, the IRS's interpretation would be entitled to deference. For more than 50 years, the IRS has expressed the view that a railroad employee could be liable for taxes on a personal injury judgment under the RRTA, even though he would not be liable for federal income taxes by virtue of Section 104.

Consistent with the statutory language from 1937 to 1983, Treasury's regulations provided that compensation includes an identifiable period of absence from the active service of the employer "on account of personal injury." 26 C.F.R. § 410.5 (1947); *see also* 26 C.F.R. §31.3231(e)-1(b)(3) (1963).

In addition, the IRS directly addressed the relationship between Section 104 and the RRTA in its revenue rulings.[29] In 1961, a railroad employee sought advice on the federal income tax consequences of the settlement of his FELA claim.

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[29] "A revenue ruling is an official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties, and regulations. It is the conclusion of the Service on how the law is applied to a specific set of facts." IRS Manual at 32.2.2.3.1 – "Revenue Ruling Defined."

See Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961). After settling the FELA claim with his railroad employer, the employee "elected, by separate agreement, to apportion part of the amount to 'time lost' in order to receive railroad retirement credit for the time he was incapacitated." *Id.* The IRS distinguished federal income tax liability from the employee's obligation to pay taxes for the same amounts under the RRTA. "The fact that in this case 'time lost payments' constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for Federal income tax purposes." *Id.* Thus, the IRS found that the employee was not required to pay income taxes on the settlement amounts of his FELA claim pursuant to Section 104(a)(2) even though that same amount was taxable as pay for time lost under the RRTA. *Id.*

The IRS reaffirmed this ruling in IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985) (explaining that Revenue Ruling 61-1 "states that the fact that the 'time lost payments' constituted compensation for purposes of the taxes imposed by the Railroad Retirement Tax Act does not preclude the application of the exclusion from gross income under section 104(a)(2)"). These revenue rulings remain in force today.

The Railroad Retirement Board has also offered guidance. A pamphlet on its website, "Pay for Time Lost From Regular Railroad Employment," explains that "[t]he most common type of pay for time lost arises out of 'on the job' personal injury settlements." *Id.* at 3 (J.A. 71a). "Pay for time lost is considered

compensation under the Railroad Retirement Tax Act. Thus an employer is required to withhold and pay the employment taxes due on pay for time lost." *Id* at 6 (J.A. 75a).

Thus, for almost six decades, the IRS has recognized that a railroad employee can be liable for RRTA taxes on personal injury damages that would be excluded from gross income for purposes of the federal income tax. That longstanding view is entitled to deference. *Davis v. United States*, 495 U.S. 472, 484 (1990).

B. The Analogy To FICA Taxes Does Not Apply

Respondent has argued that because personal injury awards are not taxable as "gross income," they are not "wages" subject to FICA taxes and because they are not "wages" under FICA, they are not "compensation" under the RRTA. (Cert. Opp. 13–14.) Respondent creates this rope bridge with a series of district court decisions, which reason that "because wages are a subset of income, income exclusions like §104(a)(2) must apply to wages, too." *Cowden v. BNSF Ry Co.*, 2014 WL 3096867 at *10 (E.D. Mo. 2014). Then they reason that wages are equivalent to compensation.

This argument has an obvious flaw: it conflates three different terms from three different statutes and claims that an exclusion from one must create an exclusion from another. This Court will "usually 'presume differences in language like this convey differences in meaning.'" *Wisconsin Cent.*, 138 S. Ct. 2071 (citation and quotation omitted).

Even if "income" is, in a general sense, a broader concept than "compensation," it does not mean that "compensation" necessarily has the same exclusions. The statute itself proves this point. As discussed above, the RRTA has a series of express statutory provisions that incorporate specific exclusions from the definition of "gross income." Congress incorporated these exclusions with care and modified the standard in certain circumstances. *See, e.g.*, 26 U.S.C. § 3231(e)(5) (making FICA exclusion applicable when "reasonable to believe"). If the term "compensation" necessarily incorporated every exclusion from gross income, then none of these incorporation provisions would have been necessary. The premise of congressional action is that the exclusions from gross income were not exclusions from compensation unless identified as such.

Respondent's cases rely on a Treasury regulation which, they say, makes "compensation" under the RRTA equivalent to "wages" under FICA. However the full regulation falls far short:

> The term compensation has the same meaning as the term wages in section 3121(a) . . . except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

26 C.F.R. § 31.3231(e)-1(a)(1) (Pet.App. 46a).

The regulation draws a parallel, but recognizes exceptions. The first exception relates to situations

specifically limited by the RRTA. The RRTA has never by its terms included an exclusion for personal injury actions, but has broadly defined compensation to include "any form of money remuneration paid to an individual for services rendered as an employee . . .." Since Congress itself has found that a payment for time lost on account of a personal injury meets this definition, the RRTA is limiting here. "So in the end all the regulation winds up saying is that we should look carefully at the relevant statutory texts." *Wisconsin Cent.*, 138 S. Ct. at 2074. The second exception applies where a regulation requires a distinction. The regulation also recognizes that the IRS can provide guidance. In this case, the IRS has provided such guidance, both in the form of a regulation that includes pay for time lost in "compensation" for purposes of the RRTA and in Revenue Rulings that specifically address the section 104 exclusion and find it inapplicable to the RRTA. Thus, as this Court recognized in *Wisconsin Central*, this regulation does not alter the outcome.

Respondent argued that the outcome under the RRTA should be the same as the outcome under FICA. Even assuming Section 104 applies to FICA, Social Security is different from the Railroad Retirement system in a critical way. Unlike the Railroad Retirement Act, the Social Security Act "does not explicitly include an employee's pay for lost time due to personal injury when calculating benefits." *Liberatore*, 140 A.3d at 30 (citing 42 U.S.C. §§ 409, 415). "Therefore it follows that for purposes of collecting SSA taxes, FICA does not tax an award for time lost due to personal injury." *Id.* In contrast, under the RRTA, pay for time lost due to

personal injury is included in *both* the computation of benefits and the calculation of taxes.

CONCLUSION

The Court should reverse the portion of the judgment that refuses an offset of the RRTA taxes.

Respectfully submitted,

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July 2018

ADDENDUM

ADDENDUM

NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

Issue: June 4, 1993
January 29, 1993

IRS LETTER RULINGS AND TAMS (1954-1997), UIL NO. 3231.04-00 DEFINITIONS, COMPENSATION V. NOT COMPENSATION, LETTER RULING 9322001, (JAN. 29, 1993), INTERNAL REVENUE SERVICE, (JAN. 29, 1993)

ISSUES

1. Whether the separation payments constitute supplemental unemployment benefit payments under Rev. Rul. 77-347, 1977-2 C.B. 362, and are excluded from the definition of "compensation" under section 3231(e)(1) of the Internal Revenue Code?

2. Whether Public Law 94-93 excluded "pay for time lost" from the definition of "compensation" under section 3231(e) of the Code?

FACTS

Prior to the tax years in dispute, the Company operated within the railroad industry as a X business. The Act generally replaced the antitrust exemption enjoyed

by the Company in favor of an approach that largely operated pursuant to fair competition and market forces. Realizing that the Act's implementation would cause many workers to lose their jobs through consolidations, complete closings, or reduced operations, the Act required X businesses to provide employees affected by the Act to make "fair arrangements ... protective of interests of such employees."

The Act continues a long history in the rail industry of private and governmental programs or agreements to extend economic benefits to workers who lose their jobs, or suffer a decrease in compensation, as a result of mergers and other rail consolidations. The Interstate Commerce Commission ("ICC") has periodically utilized individual mergers as vehicles for addressing minimum protective conditions required throughout the rail industry. One such case was presented by New York Railway's application to acquire the Brooklyn Eastern District terminal. The employee protective conditions imposed on those parties as a precondition to the merger were later determined by the ICC to be of general applicability as industry-wide minimums (the "New York Dock Conditions").

In 1987, as a result of compliance with the Act, the Company and the Company's predecessor organizations ("Company R and Company S") ceased operations as X businesses. The Company selected a form of protection based on its perception of the New York Dock Conditions standard ("Act Payment"). The Company informed employees adversely affected by the Act of their eligibility for protective benefits under the New York Dock

Addendum

Conditions. Under the Company's separation program a separated employee was paid a monthly allowance equal to the employee's compensation in the last full month of employment prior to separation. Eligible employees with at least six years of service were afforded protection for six years. The protective period for employees with less than six years of service was the length of the employee's past service.

In the tax years at issue, most affected employees received their protective payments on a monthly basis, thus reducing their remaining protective periods. Affected employees who received payments remained in an employment relationship and were subject to recall. Some employees were recalled for one or two days per week on a rotating basis. Employees were permitted but not required to secure employment but any remuneration received offset dollar for dollar the amount of the Act Payment.

Certain terminated employees were ineligible for Act Payments but were provided with lump-sum termination payments ("Payment D"). An employee in this group could elect a lump-sum payment in an amount up to the maximum of one year's salary depending upon the employee's length of service. These terminated employees were not subject to recall.

Several of Company S's terminated employees were ineligible for any benefit entitlements under the Act, New York Dock Conditions or other protective agreements. In lieu of these benefits, they were contractually accorded

employee protection in the form of either a lump-sum separation allowance equal to one year's salary, or periodic payments (depending on the applicable pay period) for an agreed-upon length of time, less any compensation or benefits that the employee might receive from outside sources ("Payments E").

The Company paid the employer's share and withheld and remitted the employee's share of RRTA taxes on all the separation payments. The Company has filed refund claims for the employer and the employee portion of the previously paid RRTA taxes. The Company contends that the payments to employees and former employees in the tax years at issue were not "compensation" within the meaning of section 3231(e) of the Code. The Company contends that the payments are excluded from compensation on two alternative grounds: (1) the payments fall within the administrative exclusion described in Rev. Rul. 77-347, 1977-2 C.B. 362, for supplemental unemployment compensation benefits ("SUB-pay") and (2) the payments qualify as payments for "time lost" under Rev. Rul 65-251, 1965-1 C.B. 395, and were removed from the definition of compensation by Congress in 1975.

LAW AND RATIONALE

The Railroad Retirement Tax Act ("RRTA") was instrumental in the establishment of a separate system of retirement, disability, and unemployment benefits for the railroad industry. Sections 3201 and 3221 of the Code impose RRTA tax on the employer and the employee with respect to "compensation" paid by the employer to the

employee. Section 3231(e)(1) defines "compensation," with certain enumerated exceptions, as any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Section 31.3231(e)-1(a)(1) of the Employment Tax Regulations provides in pertinent part:

The term "compensation" means all remuneration in money ... which is earned by an individual for services rendered as an employee to one or more employers or as an employee representative. A payment made by an employer to an individual through the employer's payroll shall be presumed, in absence of evidence to the contrary, to be compensation for services rendered by such individual as an employee of the employer....

Section 31.3231(e)-1(a)(2) of the regulations states that compensation "is not confined to amounts earned or paid for active service, but includes amounts earned or paid for an identifiable period during which the employee is absent from the active service of the employer."

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Issue No. 2

The Company's second argument is that the separation payments are not "compensation" within the meaning of section 3231(e) of the Code. Instead, the Company claims that the payments are "pay for the time lost as an employee." The Company readily admits that these

time-lost payments were compensation subject to RRTA tax prior to Pub. L. 94-93's amendment to section 3231(e). However, the Company argues that Pub. L. 94-93 effectively excluded time-lost payments from the definition of compensation. Whether time-lost payments are excluded from compensation under section 3231(e) is not a question for which an affirmative answer can be readily ascertained absent a thorough analysis of section 3231(e) and its legislative history. As explained below, such an analysis demonstrates that Pub. L. 94-93 did not act to exclude time-lost payments from the definition of "compensation."

The Company has correctly noted that Title II of Pub. L. 94-93 amended the definition of "compensation" by deleting the phrase "remuneration paid for time lost as an employee." The Company's simplistic interpretation of the amendment overlooks the amendment's true effect as is aptly demonstrated by a thorough examination of the specific statutory changes. Exhibit A to this memorandum illustrates the changes made to section 3231(e) by Pub. L. 94-93. The statute deleted the bracketed language and added the underlined language.

An understanding of section 3231(e) of the Code as it existed prior to Pub. L. 94-93 is imperative to the statutory analysis. Prior to amendment, section 3231(e) (1) generally provided that "compensation" meant "any form of money remuneration *earned by* an individual for services rendered as an employee." In other words, taxes were assessed as of the period when the wages were actually earned rather than paid. This earned concept

was added by the 1937 Act to make "it clear that what is significant is that compensation has been earned by the employee, not that it has been actually received by him."[1] The earned concept posed special considerations for time-lost payments since they are payments attributable to a prior period during which no services were actually performed. Consequently, special rules were also necessary to allocate time-lost payments to the period in which the services would have otherwise been earned.

The 1937 Act adopted the necessary timing rules by incorporating the following highlighted language into the general definition:

The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.* (emphasis added).

The highlighted language discussed both the timing and the inclusion of time-lost payments. The timing rule (the phrase beginning with the word "but") was substantive since it specifically set forth the method for determining when time-lost payments were deemed earned, *i.e.*, the period in which the time was actually lost. By contrast, the inclusion provision (the phrase beginning with the word

1. S. Rep. No. 818, 75th Cong., 1st Sess., 1939-2 C.B. 632 (1937).

"including") was not substantive, but merely served as an introductory clause to establish the proper context in which the timing rule was to be interpreted. The phrase "*including* remuneration paid for time lost" would not have been needed but for the special timing rule. The fact that this phrase followed the much broader phrase "any form of money remuneration" indicates that time-lost payments were already included as a subset of the much broader compensation definition.

The 1937 Act adopted the definition of compensation in substantially the same form as it existed prior to being amended by Pub. L. 94-93. However, the 1937 Act was amended in 1946 by Pub. L. 79-592 ("1946 Amendment"). The statute had initially included a section 4(f) which was very similar to the provisions in Pub. L. 94-93. As described by the Senate Report, section 4(f) was "necessary to change the computation of benefits and taxes from a 'compensation earned' basis to a 'compensation paid' basis."[2] As support for the change, the Senate Report stated the following:

Under present law, compensation is credited to the month in which it was earned even though *in the case of pay for time lost*, adjustment board awards, retroactive wage increases, etc., *the amount earned is not ascertained until some time later when the reports for the period in which compensation was earned have already been made. This brings about heavy administration burdens* both

2. Suppl. S. Rep. 1710, Part II, 79th Cong., 2d Sess., p. 7 (1946).

on the Board and on the employers to make thousands of corrections in reports previously filed. These are useless operations since in most cases it makes little or no difference to the employee's annuity whether the compensation is credited at the time it is paid or at the time it is earned.[3] (emphasis added).

The Senate Report is significant since it illustrates the administrative difficulties associated with crediting time-lost payments to the proper period. It also indicates that the 1946 Amendment would not have excluded these payments from the definition of compensation, but would have only required that they be credited when paid. Although the 1946 Amendment was enacted, section 4(f) was not enacted; therefore, the computation of taxes remained on a "compensation earned" basis.

A second significant piece of background material was the publication of Rev. Rul. 75-266, 1975-2 C.B. 408, just one month prior to Pub. L. 94-93's enactment. Rev. Rul. 75-266 generally provided that lump-sum back pay was subject to RRTA taxes to the extent and at the rate of tax applicable when it was earned.

The portion of Pub. L. 94-93 which amended the definition of compensation was enacted in direct response to Rev. Rul. 75-266 and sought to alleviate the administrative burden which was first described in the Senate Report to the 1946 Amendment. Public Law 94-93's underlying purpose was discussed by several senators and congressmen prior to

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3. Id.

its enactment. For example, Senator Long, Chairman of the Senate Finance Committee, explained the change as follows:

The amendment deals with the method of assessing railroad retirement payroll taxes. It essentially restores the practice existing up until this year when a new revenue ruling [Rev. Rul. 75-266] interpreted the law to require that these taxes be assessed as of the period when the wages were actually earned. This revenue ruling creates an administrative burden on railroad employers and provides a taxing basis which is inconsistent with the basis under which the Railroad Retirement Board credits wages to employee accounts for benefit computation purposes. This amendment will make the two procedures consistent in that for both tax assessment and benefits computation purposes wages will be considered to be earned as of the period when they are actually paid except that the employee may, at his option, request [under subsection (e)(2)] that these determinations be made on the basis of when the wages were actually earned.[4]

Also of importance was the comment made by Representative Staggers which linked Pub. L. 94-93 with section 4(f) of the 1946 Amendment:

[T]he Internal Revenue Service has ruled in Revenue Ruling 75-266 ... that compensation is to be taxed under the Railroad Retirement Tax Act as of the period when earned irrespective of when it was paid. The bill would

4. Vol. 121 Cong. Record 26759 (Aug. 1, 1975).

amend the Railroad Retirement Act to clarify the intention originally expressed in 1946, that compensation is to be taxed only on an "as paid" basis.[5]

Senator Long's comments are further underscored by an exchange between Representatives Conable and Stieger on the House floor that same day:

Mr. CONABLE. .... Is it not true that this also does not act as a precedent in other areas, it relates only to Railroad Retirement and will not cause serious problems beyond the $10,000 revenue loss, which is estimated to be the total impact on the Treasury?

Mr. STIEGER. It is not a precedent. It is only an administrative change.[6]

These exchanges in the Senate and in the House of Representatives highlight two very important points about Pub. L. 94-93, both of which fully support the proposition that Pub. L. 94-93 did not act to exclude time-lost payments from the definition of compensation. First, the change from an earned basis to a paid basis was only an administrative change, not a substantive change. It was merely intended to deal with the administrative burdens described in the Senate Report to the 1946 Amendment. As alluded to in that report, shifting the statute's focus to a compensation paid basis only affected the administrative problem of when (not whether) time-lost payments

5. Vol. 121 Cong. Record 24479 (July 24, 1975).

6. Vol. 121 Cong. Record 27014 (August 1, 1975).

constitute compensation. By contrast, excluding time-lost pay from the definition of compensation would have been a very significant substantive change. Second, the colloquy between Representatives Conable and Stieger indicates that the estimated total impact of the amendment was $10,000. Obviously, if Congress had intended to specifically exclude time-lost pay from compensation, then it would have been readily apparent that the financial impact would have far exceeded Treasury's estimates. The difference between the two figures is too great to support the Company's position that time-lost payments were statutorily excluded from compensation and, therefore, from taxation. This relatively minuscule estimate of the revenue loss, coupled with the numerous assertions that the amendment was an administrative response to Rev. Rul. 75-266, further demonstrates that time-lost payments were still included within the definition of compensation after Pub. L. 94-93.

Having briefly examined section 3231(e)(1) of the Code as it existed prior to Pub. L. 94-93, the next relevant step is to actually examine the statutory changes achieved by Pub. L. 94-93. Exhibit A illustrates that Pub. L. 94-93 shifted the statute's focus from whether an item was "earned by an individual" to whether it was "paid to an individual." An example illustrates the difference between the two methods. Under the "as paid" method, if an employee receives time-lost payments in the current year attributable to services performed in a prior year, then the RRTA tax liabilities are computed using the tax rates and monthly compensation limits for the current year. By contrast, under the "as earned" method, the tax

liabilities would be computed using the prior year's tax rates and monthly compensation limits since that was the year in which the time-lost payments were earned.

As previously explained, the timing rule was inextricably tied to this "earned" concept. Consequently, the statute's substitution of the phrase "earned by an individual" with the phrase "paid to an individual" directly affected the need for and the continued viability of the special timing rule. The timing rule was no longer necessary once the general definition of compensation was amended to include items on a "paid basis" rather than on an "earned basis." Therefore, the need for the inclusion provision in subsection (e)(1) was also eliminated and no inference should be drawn that time-lost payments were intended to be excluded from compensation.

The fact that time-lost payments were still included within the general definition of "compensation" after Pub. L. 94-93 is further demonstrated by the fact that subsection (e)(2) continued to specifically refer to time lost.[7] The Company

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7. With respect to the years in issue, the definition of "compensation" for benefit purposes (section 231(h) of the Railroad Retirement Act ("RRA")) is similar to the definition for taxation purposes. One notable distinction is that section 231(h) continued to specifically include payments for time lost even after the references were omitted from section 3231(e) of the Code (*see* the emphasized language in Exhibit B). Obviously, Title 45 does not control Title 26 and vice versa. Nonetheless, the statutes are two sides of the same coin, *i.e.*, RRTA is the revenue side of the coin and RRA is the benefit/expenditure side. The courts are aware of this legislative interrelationship. *See Standard Office Building Corporation v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987);

apparently views this as a mere Congressional oversight. Such an argument might have some merit if the reference to time lost had been in a different subtitle or, at the very least, a different Code section. However, the Company's position lacks merit since (i) the reference was within the same Code section and (ii) Pub. L. 94-93 also extensively amended subsection (e)(2) without deleting the time-lost reference. If Congress had intended to exclude time-lost payments from compensation, then Pub. L. 94-93 would have clearly eliminated the reference in subsection (e)(2). The fact that Congress amended subsection (e)(2) without deleting the time-lost reference indicates that time-lost payments continued to be included in compensation after Pub. L. 94-93.

Although the Company's assertion only relates to Pub. L. 94-93, this analysis would not be complete without examining subsequent amendments to the definition of compensation. In this regard, two significant acts were adopted in 1981 and 1983. An examination of these two acts demonstrates that time-lost payments were not subsequently excluded from the definition of compensation.

The 1981 Act amended subsection (e)(2) by reinserting the sentence which had previously been deleted by Pub. L. 94-93 (the bracketed sentence in Exhibit A). Essentially,

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Florida East Coast Railway Company v. United States, 470 F.2d 513, 517 (Ct. Cl. 1972); *City of Galveston, Texas v. United States*, 22 Cl. Ct. 600, 610 (1991), *rev'd* 949 F.2d 404 (Fed. Cir. 1991). As such, it is incongruous to conclude that congress intended that benefits accrue for time-lost payments without a corresponding collection of taxes.

that introductory provision reestablished the rebuttable presumption that a payroll payment is compensation for the employee's services in the period with respect to which the payment is made. Section 31.3231(e)-1(a)(1) of the regulations provides that a "payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary to be compensation for services rendered by such individual as an employee of the employer." Obviously, this amendment and the regulations are significant since the Company's payments were apparently payroll payments. Even more significant is the Conference Report which states in pertinent part:

> The House bill also provides that, in the absence of evidence to the contrary ... payments by railroad employers shall be presumed to be compensation for services rendered as an employee in the period for which the payment is made, *an employee receiving retroactive wage payments (such as* lump sum retroactive wage payments and *crew consists payments) will be deemed under the provision to be compensation paid in the period for which the payment is made* unless the employee requests in writing (pursuant to existing provisions in sec. 3231(e)(2)) that such compensation was earned in a period other than the period in which it was paid."[8](emphasis added).

Crew consist payments resemble time-lost payments under both the Washington Agreement and the New York Dock Conditions, especially to the extent that they are paid for

---

8. Conf. Rep. No. 97-215, 97th Cong., 1st Sess., p. 267 (1981).

periods in which no actual services are performed. The Conference Report leaves little doubt that these type of payments continued to constitute compensation after Pub. L. 94-93. The only question regarding these payments was when, not whether, they constitute compensation.

In one of the more extensive amendments affecting section 3231(e) of the Code, section 225 of the Railroad Retirement Solvency Act of 1983 ("1983 Act") deleted the former subsection (e)(2). As such, the last specific reference to pay for time lost was removed from section 3231(e).[9] Former subsection (e)(2) was replaced with provisions which: (i) exclude compensation in excess of the applicable base, (ii) define "applicable base," and (iii) provide for the applicability of successor employer provisions. This technical amendment was necessary to shift the definition of compensation from a monthly wage base to an annualized wage base.[10] In describing subsection (e)(2)'s deletion of the special timing provisions, the Committee Report simply stated that "compensation would be taxed when it is paid to the employee,"[11] *i.e.*, employees could no longer elect to deem payment in the period in which the compensation was earned. The 1983 Act's legislative history does not provide even the remotest

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9. The instructions to Form CT-1, Employer's Annual Railroad Retirement and Unemployment Repayment Tax Return, have been published virtually unchanged over a 25-year period. Those instructions have continued to include time-lost payments as compensation (even after Pub. L. 94-93 and the 1983 Act).

10. H. Rep. No. 98-30, 98th Cong., 1st Sess., p. 21 (1983).

11. Id. at 29.

indication that the 1983 Act intended to exclude time-lost payments from the definition of compensation. In fact, the extensive revenue loss caused by such an exclusion would have been in direct opposition to the 1983 Act's stated purpose "to improve the financial status of the Railroad Retirement System."[12]18

CONCLUSIONS

1. Revenue Ruling 77-347 is inapplicable to the separation payments since the payments disqualify the recipients from receiving railroad unemployment benefits. Therefore, the separation payments are "compensation" under section 3231(e)(1) of the Code.

2. Public Law 94-93 shifted the determination of compensation from an "as earned" basis to an "as paid" basis. Therefore, Pub. L. 94-93 only affected when, not whether, time-lost payments were included as compensation. The fact that Pub. L. 94-93 did not exclude time-lost payments from compensation is fully supported by the statute and the legislative history.

A copy of this Technical Advice Memorandum is to be given to the Company. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

EXHIBIT A

(e) Compensation.--For purposes of this chapter--

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12. Id. at 19.

Addendum

(1) The term "compensation" means any form of money remuneration [earned by] *paid to* an individual for services rendered as an employee to one or more employers [, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost] .... Compensation which is earned during the period for which the [Commissioner] *Secretary or his delegate* shall require a return of taxes under this [subchapter] *chapter* to be made and which is payable during the calendar month following such period shall be deemed to have been paid during such period only.

(2) [A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made.] *An employee shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and at a showing that such compensation was earned during a period other than the period in which it was paid.* An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a

personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

EXHIBIT B

(h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.* A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231(h) of this title, the period during which such compensation will have been earned.

Addendum

(2) *An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.* (emphasis added).

No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

MICHAEL D. LOOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the satisfaction of a judgment under the Federal Employers' Liability Act that includes an award of lost wages is subject to taxation under the Railroad Retirement Tax Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

GLOSSARY xvii

INTRODUCTION 1

STATEMENT 2

A. Statutory Background 2

B. "Compensation" Under The RRTA 7

C. The Proceedings Below 12

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. A FELA JUDGMENT IS NOT TAXABLE COMPENSATION UNDER THE RRTA 16

A. The RRTA's Text Does Not Cover FELA Damages Judgments 16

1. The RRTA taxes remuneration "for services rendered" 16

2. A FELA damages award is not remuneration for services rendered 20

B. Petitioner's Invocations Of Different Statutes To Define The RRTA Lack Merit 21

1. The inclusion of "pay for time lost" in the RRA does not support reading the RRTA to tax FELA damages awards for past wage loss 22

a. The RRTA does not tax "pay for time lost" 22

i. "Pay for time lost" is not a form of remuneration for services rendered 23

ii. "Pay for time lost" expands the definition of compensation 24

iii. Congress amended the RRTA to remove "pay for time lost" 27

iv. The RRA and the RRTA are not *in pari materia* 29

b. In any event, "pay for time lost" does not encompass satisfaction of a FELA judgment 32

2. Decisions interpreting the Social Security Act and FICA likewise do not support reading the RRTA to tax FELA damages for past wage loss 34

C. The Court Of Appeals' Approach Advances Congress's Purposes 40

II. A FELA JUDGMENT IS NOT TAXABLE INCOME UNDER THE RRTA 41

A. Section 104(a)(2) Excludes Personal-Injury Damages From The RRTA's Tax On Employee Income 42

B. Applying § 104(a)(2) To The RRTA's Employee Tax Comports With The Prevailing Approach Under FICA 44

C. Petitioner's Responses Lack Merit 47

1. The textual relationship of the RRTA to § 104(a)(2), not their location in the Code, governs 47

2. Cross-references to fringe-benefit exclusions do not negate the general exclusion for personal-injury damages 47

III. TREASURY HAS NOT ADDRESSED WHETHER A FELA JUDGMENT IS TAXABLE UNDER THE RRTA, AND ITS LITIGATING POSITIONS DO NOT WARRANT DEFERENCE 52

A. *Chevron* Deference Is Inappropriate In This Case 52

B. The Regulations' Inclusion Of "Pay For Time Lost" Does Not Support Petitioner's Position 53

C. The Revenue Rulings Do Not Support Petitioner's Argument 54

D. History Supports The Court Of Appeals' Interpretation 54

CONCLUSION 56

STATUTORY ADDENDUM ..... Add. 1

TABLE OF AUTHORITIES

Page

CASES

Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017) 19, 27, 34

Alaska v. Federal Subsistence Bd., 544 F.3d 1089 (9th Cir. 2008) 56

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Carcieri v. Salazar, 555 U.S. 379 (2009) 21, 47

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Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 15, 52, 54

Chicago & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570 (1971) 39

Christensen v. Harris Cty., 529 U.S. 576 (2000) 53

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Dodd v. United States, 545 U.S. 353 (2005) 47

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Elgin v. Department of Treasury, 567 U.S. 1 (2012) 51

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) 54

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Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941) 27

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Iselin v. United States, 270 U.S. 245 (1926) 29

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 41

Kellogg Brown & Root Servs. v. United States, 135 S. Ct. 1970 (2015) 28, 33

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Michigan v. EPA, 135 S. Ct. 2699 (2015) 54

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New York Cent. R.R. Co. v. Winfield, 244 U.S. 147 (1917) 20, 40

Nielsen v. BNSF Ry. Co., No. 0807-10580, 2012 WL 12526344 (Or. Cir. Ct., Multnomah Cty., Mar. 5, 2012) 55

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Act of Aug. 29, 1935, ch. 813, 49 Stat. 974 ..... 2, 43

§ 2, 49 Stat. 975 43

Act of July 31, 1946, ch. 709, 60 Stat. 722 8

§ 2, 60 Stat. 722 ..... 9, 10

§ 3(a), 60 Stat. 723 44

§ 3(f), 60 Stat. 725 ..... 8, 9, 10, 32

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§ 1(e), 50 Stat. 436 ..... 8, 32

§ 2(a), 50 Stat. 437 43

Civil Service Reform Act of 1978, 5 U.S.C. § 7703(b)(2) 51

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45 U.S.C. § 57 25

Federal Insurance Contributions Act, 26 U.S.C. § 3101 *et seq.* ..... *passim*

§ 3101(a) 5, 44

§ 3111(a) 5

§ 3121(a) 5, 38

§ 3121(a)(18) 50
§ 3121(a)(19) 50
§ 3121(a)(20) 50
§ 3121(a)(22) 50
§ 3121(b) 38
Internal Revenue Code (26 U.S.C.):
§ 61 42
§ 61(a)(1) 42
§ 74(c) 50, 51
§ 104(a)(2) 2, 5, 13, 15, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 55
§ 106(b) 50, 51
§ 106(d) 50, 51
§ 108(f) 51
§ 108(f)(4) 50
§ 117 50
§ 119 ..... 45, 50
§ 127 ..... 50, 51
§ 132 ..... 50, 51
§ 421(a) 50
§ 422(a)-(b) 50
§ 423(a)-(b) 50
§ 7701(c) 27
§ 7805 54
§ 7806 47

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Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* 25, 26

§ 902(3)..... 26

§ 902(4)..... 25

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§ 1, 48 Stat. 1283-84 7

Railroad Retirement Act, 45 U.S.C. §§ 231-231v .....*passim*

§ 231(f)(1)..... 4, 23

§ 231(h)(1) 4, 22, 24

§§ 231a-231b 30

§ 231a(a)(1) 19

§ 231a(e)(1)..... 19

§ 231b(a)..... 4

§ 231b(b)..... 4

§ 231b(i)(2) 18, 23, 46

§ 231f..... 4

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§ 3201 42
§ 3201(a) 3, 4, 7, 16, 48
§ 3201(b) 4, 17, 48
§ 3221 ..... 40, 42
§ 3221(a) 3, 48
§ 3221(b) 48
§ 3231(b) 3
§ 3231(d) 38
§ 3231(d)(1) 3, 17, 38
§ 3231(d)(2) 3, 17, 38
§ 3231(e) 4
§ 3231(e)(1) (1970) 11
§ 3231(e)(1) 11, 17, 22, 38, 49
§ 3231(e)(1)(i) 19
§ 3231(e)(2) (1970) 11
§ 3231(e)(2) 12, 22
§ 3231(e)(2)(C) 5
§ 3231(e)(2)(C)(i) 39
§ 3231(e)(3) 51
§ 3231(e)(4)(A)-(B) 19
§ 3231(e)(4)(A)(i) 20
§ 3231(e)(5) 48 49, 50
§ 3231(e)(6) 48, 49, 50
§ 3231(e)(9) 48, 49, 50

§ 3231(e)(10) 48, 49, 50
§ 3231(e)(11) 48, 49, 50
§ 3231(e)(12) 50
§ 3241 30
Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-369 ..... 8, 19, 20, 31, 33
§ 351(i) 20
§ 351(i)(1) 31
§ 352(a)(1)(B) 20
§ 353 20
§ 362(*o*) 33
Revenue Act of 1916, ch. 463, 39 Stat. 756 32
Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919) 5
§ 213(b)(6), 40 Stat. 1066 ..... 5, 43
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1934 RRA	Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934)
1935 Act	Act of Aug. 29, 1935, ch. 813, 49 Stat. 974
1937 Act	Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435
1946 Act	Act of July 31, 1946, ch. 709, 60 Stat. 722
AAR	American Association of Railroads
AAR Statement	Statement of Sidney S. Alderman, General Solicitor, Southern Railway, on Behalf of the Association of American Railroads, *Railroad Retirement: Hearings on H.R. 1362 Before the H. Comm. on Interstate and Foreign Commerce*, 79th Cong., pt. 2, at 563 (1945)
Board	Railroad Retirement Board
Code	Internal Revenue Code (26 U.S.C.)
FELA	Federal Employers' Liability Act
IRS	Internal Revenue Service
Latimer Statement	Statement of Murray W. Latimer, Chairman, Railroad Retirement Board, *Railroad Retirement: Hearings on H.R. 1362 Before the H. Comm. on Interstate and Foreign Commerce*, 79th Cong., pt. 1, at 31 (1945)

LHWCA	Longshore and Harbor Workers' Compensation Act
RRA	Railroad Retirement Act
RRTA	Railroad Retirement Tax Act
RUIA	Railroad Unemployment Insurance Act
Schreiber	David B. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* (1978)
SSA	Social Security Act
Washington Agreement	Washington Job Protection Agreement (1936) (reproduced at *Chesapeake & O. Ry. Co. v. United States*, 571 F.2d 1190, 1206-12 (D.C. Cir. 1977) (Appendix))

INTRODUCTION

Under the plain language of the Railroad Retirement Tax Act ("RRTA"), satisfaction of a judgment under the Federal Employers' Liability Act ("FELA") is not taxable for the plaintiff. Tort damages do not fall within the RRTA's definition of taxable compensation – they are not remuneration "for services rendered." Damages are paid for breach of a legal duty, not for services rendered. In satisfying a FELA judgment, a railroad pays an injured worker damages for its negligence, not remuneration for services the worker rendered. The Eighth Circuit properly construed the RRTA in concluding that petitioner's satisfaction of respondent's FELA judgment is not taxable under that statute.

Petitioner's argument (at 18) that the RRTA's text is "not so plain" is unavailing. Petitioner and the government seek to define "compensation" in the RRTA by resorting to a range of other statutes and cases, when the most direct path to understanding Congress's intent is in the RRTA's plain language.

Another basis to affirm the Eighth Circuit's judgment is the district court's correct determination that the Internal Revenue Code's general exemption for personal-injury damages awards from "income" also applies to this case. Since 1919, such awards generally have been exempt from income tax, and there is no indication Congress impliedly repealed that general rule for the RRTA's tax "imposed on income." In the thousands of FELA cases that have gone to judgment in the past century, petitioner and its *amici* point to no situation in which the Internal Revenue Service ("IRS") imposed RRTA taxes on a FELA damages judgment. Decades of experience confirm the result Congress intended.

STATEMENT

A. Statutory Background

This case involves the interrelationship of multiple statutory schemes: the RRTA imposes taxes to help fund retirement benefits for *railroad* workers; the Railroad Retirement Act ("RRA") governs those benefits; the Federal Insurance Contributions Act ("FICA") funds Social Security benefits for *non-railroad* workers; Internal Revenue Code § 104(a)(2) generally excludes personal-injury recoveries from income taxation; and FELA enables railroad workers to recover for injuries caused by their employers' negligence.

RRTA. As early as 1875, railroads developed private pension schemes, and by 1927 those plans covered as many as three-fourths of all railroad workers. *See* David B. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 1 (1978) ("Schreiber"). Those private pensions, however, were "generally inadequate, liable to capricious termination, and of little assistance to disabled employees"; and the Great Depression soon pushed them into "a state of crisis," prompting Congress to design a federal pension system for retired and disabled railroad workers. Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008).

After the Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934) ("1934 RRA"), was declared unconstitutional in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), Congress enacted separate taxing and benefits statutes.[1] Although a federal district court enjoined enforcement of the tax statute,

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[1] Act of Aug. 29, 1935, ch. 813, 49 Stat. 974 ("1935 Act"); Railroad Retirement Act of 1935, ch. 812, 49 Stat. 967.

see Alton R.R. Co. v. Railroad Ret. Bd., 16 F. Supp. 955 (D.D.C. 1936), the Railroad Retirement Board ("Board") began awarding annuities under the benefits statute. *See* Schreiber at 16-17. In 1936, the railroads and unions signed the Washington Job Protection Agreement ("Washington Agreement"), which provided protections for workers adversely affected by consolidation in the industry, including payments to workers deprived of employment or displaced to lower-paying positions. *See Chesapeake & O. Ry. Co. v. United States*, 571 F.2d 1190, 1206-12 (D.C. Cir. 1977) (reproducing agreement).

In 1937, pending appeal of the 1936 *Alton* decision, railroad management and unions reached a compromise agreement on the pension system, which became the basis for a revised version of the taxing and benefits statutes. The taxing bill was known as the Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435 ("1937 Act"). In 1939, Congress incorporated that Act into the Internal Revenue Code and, in 1946, renamed it the RRTA.

The basic structure of the RRTA as enacted in 1937 remains in place today. Employers and employees each pay RRTA taxes. Employers pay "an excise tax" based on "compensation paid during any calendar year by such employer for services rendered to such employer." 26 U.S.C. § 3221(a). The employee's tax is "imposed on the income of each employee." *Id.* § 3201(a).

An "employee" under the RRTA is an "individual in the service of" an employer for "compensation." *Id.* § 3231(b). An employee is in the "service" of an employer when he is "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" and "he renders such service for compensation." *Id.* § 3231(d)(1)-(2).

In the RRTA, Congress used the term "compensation" to define the tax base – what is subject to taxation. Specifically, the RRTA provides in pertinent part that "there is hereby imposed on the income of each employee a tax equal to [a specified] percentage of the compensation received during any calendar year by such employee for services rendered by such employee." *Id.* § 3201(a)-(b). The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." *Id.* § 3231(e).

RRA. The RRA provides a pension system to railroad employees, 45 U.S.C. §§ 231-231v, which the Board administers, *id.* § 231f. Benefits are provided in two tiers. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75 (1979). Tier 1 benefits are equivalent to Social Security benefits. 45 U.S.C. § 231b(a). Tier 2 benefits are "like a private pension" and "tied to earnings and career service." *Hisquierdo*, 439 U.S. at 574. The amount of Tier 2 benefits an employee receives is based on "years of service" and the average of the employee's highest 60 months of creditable "compensation." 45 U.S.C. § 231b(b). "[Y]ears of service" means in pertinent part "the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost." *Id.* § 231(f)(1). Under the RRA, "compensation" means "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers . . . including remuneration paid for time lost as an employee." *Id.* § 231(h)(1).

FICA. "The same Congress that enacted the [RRTA] enacted a companion statute, [FICA], to fund social security pensions for employees in other

industries." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018). FICA and the RRTA share the same basic structure, but with different tax bases. Under FICA, employers also pay "an excise tax." 26 U.S.C. § 3111(a). For employees, FICA taxes are "imposed on the income of every individual." *Id.* § 3101(a).

The amount of the FICA tax on employee income is based on a percentage of "the wages (as defined in section 3121(a)) received by the individual with respect to employment." *Id.* Congress defined the tax base for FICA ("wages") differently from the tax base for the RRTA ("compensation"). FICA "wages" are defined in pertinent part as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* § 3121(a).

In 1992, legislation proposing to synchronize RRTA "compensation" with FICA "wages" was introduced. *See* 138 Cong. Rec. 2101-02 (1992). Congress did not adopt that proposal and has kept the respective tax-base definitions separate and distinct. *See* 26 U.S.C. § 3231(e)(2)(C) (incorporating FICA provision relating to successor employers into RRTA but substituting RRTA definitional terms).

§ 104(a)(2). Internal Revenue Code § 104(a)(2) excludes from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). A version of that provision has remained in effect since the Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1057, 1066 (1919) ("1918 Revenue Act"). The § 104(a)(2) exclusion is not limited to damages

for medical expenses or pain and suffering: "It also excludes from taxation those damages that substitute . . . for lost wages, which would have been taxed had the victim earned them." *O'Gilvie v. United States*, 519 U.S. 79, 86 (1996). Juries are instructed not to consider federal or state income taxes in awarding damages. *See Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 496 (1980).

FELA. Enacted in 1908, FELA makes a railroad liable for negligently causing an employee's injuries. 45 U.S.C. §§ 51-60; *see CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688 (2011). Congress sought to give railroads a compelling financial reason to provide a safe workplace. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) ("FELA was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations"). Congress passed FELA before the widespread adoption of workers' compensation schemes, and many States continue to exclude railroad employees from workers' compensation coverage "on the assumption that FELA provides adequate protection." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Because of the dangers of railroad work, railroads have faced many thousands of FELA cases. Pet. 22. During the 80-year coexistence of FELA and the RRTA, neither petitioner nor *amici* point to any instance in which the IRS has imposed RRTA taxes on payment in satisfaction of a FELA judgment.

No Treasury regulation expressly states that satisfaction of FELA judgments are subject to RRTA taxation. Instead, the IRS "has consistently held that compensatory damages, including lost wages, received on account of a personal physical injury are excludable

from gross income with the exception of punitive damages" and that "[t]here is general agreement that to the extent damages are excludable from gross income, they are not subject to employment taxes." Lawsuits, Awards, and Settlements Audit Techniques Guide 8, 14 (May 2011);[2] *see also* IRS, Memorandum from the Office of Chief Counsel at 8 (Oct. 22, 2008) ("Amounts excludable from gross income under § 104(a)(2) . . . are not wages for FICA and income tax withholding purposes.");[3] IRS P.L.R. 200303003, at 4 (Jan. 17, 2003) ("There is general agreement that to the extent damages are excludable from gross income under section 104(a)(2), they are not subject to employment taxes.").[4]

B. "Compensation" Under The RRTA

The RRTA consistently has taxed employee "income," with the tax base being a specified "percentage" of the defined term "compensation." 26 U.S.C. § 3201(a). The RRTA's definition of "compensation" has changed over the years, however.

The RRTA's earliest predecessor statute from 1934 used "compensation" without defining the term. *See* 1934 RRA § 1, 48 Stat. 1283-84. The 1935 taxing statute defined compensation as "any form of money remuneration for active service, received by an employee from a carrier." 1935 Act § 1(d), 49 Stat. 974.

1937 Taxing Statute. In the revised Carriers Taxing Act of 1937, Congress defined "compensation" as

> any form of money remuneration earned by an individual for services rendered as an employee

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[2] https://www.irs.gov/pub/irs-utl/lawsuitesawardssettlements.pdf.

[3] http://www.irs.gov/pub/lanoa/pmta2009-035.pdf.

[4] https://www.irs.gov/pub/irs-wd/0303003.pdf.

> to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.

§ 1(e), 50 Stat. 436.

The 1937 Act intended to "make[] it clear that what is significant is that compensation has been earned by the employee, not that it has been actually received by him," and "that compensation received by an employee in respect of months during which he was ill or on vacation is to be included in the compensation of the employee's tax liability." S. Rep. No. 75-818, at 4 (1937); *accord* H.R. Rep. No. 75-1071, at 5-6 (1937) (same).

1946 Omnibus Amendments. In 1946, Congress substantially revised the RRTA, the RRA, and the Railroad Unemployment Insurance Act ("RUIA"). *See* Act of July 31, 1946, ch. 709, 60 Stat. 722 ("1946 Act").[5] Congress amended the RRTA's definition of taxable compensation to add the following:

> An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation.

§ 3(f), 60 Stat. 725. Congress made the same change to the RRA, thus giving employees a boost toward

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[5] The RUIA provides unemployment and sickness benefits to qualified railroad workers. 45 U.S.C. §§ 351-369.

achieving their months of creditable compensation for an RRA annuity. § 2, 60 Stat. 722.

Those RRTA and RRA amendments expanded the scope of the term "time lost" in two ways. First, they applied "time lost" to include not just payments to workers deprived of employment as a result of railroad mergers,[6] but also payments for displacement to a less remunerative position under the 1936 Washington Agreement. *See Chesapeake*, 571 F.2d at 1208-09 (Appendix). The new definition of compensation clarified that "remuneration paid for time lost as an employee" also included a "displacement allowance" under the Washington Agreement – that is, "the amount he is paid by the employer for loss of earnings resulting from his *displacement to a less remunerative position or occupation*." 1946 Act §§ 2, 3(f), 60 Stat. 722, 725 (emphasis added).

Second, the amendments expanded "time lost" payments to include payments for "absence on account of personal injury." *Id.* That language "provide[d] for crediting pay for time lost on account of personal injuries even though the pay is included in a general *settlement*." S. Rep. No. 79-1710, pt. 2, at 7-8 (1946) (emphasis added). The change "was necessary because the railroads were unwilling to make such payments subject to the provisions of the taxing act." Schreiber

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[6] The Board and railroads agreed that such "coordination allowances" were "payment[s] for time lost." *Railroad Retirement: Hearings on H.R. 1362 Before the H Comm. on Interstate and Foreign Commerce*, 79th Cong., pt. 1, at 46 (1945) (Statement of Murray W. Latimer, Chairman, Railroad Retirement Board) ("Latimer Statement"); *see also id.*, pt. 2, at 574 (Statement of Sidney S. Alderman, General Solicitor, Southern Railway, on Behalf of the Association of American Railroads) (pay for time lost "definitely refers to . . . a payment under the so-called Washington agreement") ("AAR Statement").

at 53. Indeed, the American Association of Railroads ("AAR") vociferously opposed the change, arguing that personal-injury *settlements* did not fall within either "remuneration for services rendered" or the concept of "pay for time lost." *See* AAR Statement at 574-75 ("But when I pay an injured employee for a lost arm, I am settling a legal liability for his injury. I am paying him for his lost arm, not for his lost time. It is not remuneration for either services or for lost time, but it is compensation for injury and loss of the member and for loss of earning capacity. It clearly is not creditable or taxable compensation under these acts.").

The amendments also created a default presumption to allocate an entire settlement payment to time lost, thereby increasing an employee's creditable compensation. *See* 1946 Act §§ 2, 3(f), 60 Stat. 722, 725. The railroads objected to that provision as well, arguing that "[i]t deliberately seeks to convert a personal-injury settlement into a lost-time settlement, when lost time is only one of the many elements or factors entering into the estimation of such settlements." AAR Statement at 576.

The legislative history to the 1946 amendments repeatedly stated that "pay for time lost" in the personal-injury context refers to *settlements* of personal-injury claims.[7] Our research found no reference in that legislative history to taxes being paid or owed on the satisfaction of FELA judgments.

1975 and 1983 Amendments. After further amendments, by 1970, the RRTA's definition of compensation mirrored the RRA's definition and read as follows:

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[7] *See, e.g.*, S. Rep. No. 79-1710, pt. 2, at 7-8; Latimer Statement at 46, 162; AAR Statement at 576.

> (1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. . . .
>
> (2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

26 U.S.C. § 3231(e)(1)-(2) (1970) (emphases added).

In 1975, Congress removed the "pay for time lost" language from the definition of "compensation" in § 3231(e)(1) "by striking out the first sentence and inserting in lieu thereof: 'The term "compensation"

means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.'" Act of Aug. 9, 1975, Pub. L. No. 94-93, § 204, 89 Stat. 466, 466. Congress retained the reference to "pay for time lost" in § 3231(e)(2). Although Congress amended the RRA at the same time, it did not alter the RRA's definition of compensation. *See* Act of Aug. 9, 1975, Pub. L. No. 94-92, § 201, 89 Stat. 461, 464-65.

In 1983, Congress substantially revised § 3231(e)(2), removing all language referring to payments by employers for time lost or personal injury. *See* Railroad Retirement Revenue Act of 1983, Pub. L. No. 98-76, tit. II, § 225(a)(1), 97 Stat. 411, 419, 424-25. As with the 1946 amendments, Congress simultaneously amended the RRA's definition of compensation: Congress expanded the definition of creditable compensation to encompass certain separation, subsistence, and termination allowances but did not amend the applicable provisions for time lost or personal injury. *Id.* § 403, 97 Stat. 434. The current RRTA contains no reference to pay for time lost or personal injury.

C. The Proceedings Below

Respondent Michael Loos incurred injuries when he fell through snow that covered an unmarked drain in petitioner's railyard. Before Loos filed this FELA suit, petitioner terminated his employment. App. 4a, 7a. The case was submitted to a jury, which, at petitioner's request, was instructed that "[t]he plaintiff will not be required to pay any federal or state income taxes on an amount that you award." ECF#74, at 38 (request); JA91a (final instruction). The jury verdict found petitioner liable for negligence and awarded Loos total damages of $126,212.78, which included $85,000 for past pain, disability, and emotional

distress, $11,212.78 for past medical expenses, and $30,000 for past wage loss. JA92a-95a.

Petitioner moved to offset the verdict by $3,765, the amount it claimed was due for RRTA withholdings on the wage-loss portion of the damages award. App. 28a-29a; JA11a-12a. The district court denied the offset, concluding that, because the damages were on account of personal physical injuries, § 104(a)(2) excluded them from taxation under the RRTA. App. 29a-30a.

The Eighth Circuit affirmed the judgment. App. 17a-24a. It held that the RRTA's definition of taxable compensation does not cover the damages for past wage loss awarded to respondent because, "[u]nder the RRTA's plain text, damages for lost wages are not remuneration 'for services rendered.'" App. 20a. Rather, the court explained, damages for lost wages are "remuneration for a period of time during which the employee did not actually render any services." *Id.* Therefore, "damages for lost wages do not fit within the plain meaning of the RRTA." *Id.*

The Eighth Circuit also rejected petitioner's argument that the court should "read the RRA definition of 'compensation'" – which includes "pay for time lost" – "into the RRTA." App. 21a. Noting that Congress had expressly removed "pay for time lost" from the RRTA's definition of compensation, the court rejected petitioner's invitation to import "the very language Congress eliminated." App. 23a. Having resolved the appeal based on the RRTA's definition of "compensation," the court declined to address whether § 104(a)(2) provided an additional ground for excluding respondent's damages award from taxation. App. 24a.

SUMMARY OF ARGUMENT

The RRTA does not tax satisfaction of a FELA judgment for two independent reasons.

I. The Eighth Circuit correctly concluded that damages for personal physical injuries do not fall within the statutory definition of "compensation" because they are not "remuneration for services rendered." When a railroad satisfies a FELA judgment, it pays for failing to uphold the standard of due care owed to an employee. The railroad pays for a tort, not for services rendered. Such a payment is therefore not "compensation" under the RRTA.

Petitioner tries (at 18) to avoid this outcome by arguing that the text is "not so plain." Its case in chief is that, to define RRTA compensation, the Court must look to *other* statutes. That approach is unpersuasive.

Petitioner and the government argue that "pay for time lost" is an "illustrative example" in the definition of compensation in the RRA – a separate benefits statute – and so encompassed within the RRTA's shorter definition of compensation for taxation. In the RRA, however, "pay for time lost" is not an example of remuneration "for services rendered," but rather an *additional* term that expands the RRA's definition of compensation. Pay "for time lost" is no longer in the RRTA's definition of compensation; when Congress deleted those words from the taxing statute in 1975 and 1983, its actions had meaning. Like FICA and the Social Security Act ("SSA"), the RRTA and the RRA are not *in pari materia*, and there is no basis for reading into the RRTA the RRA's reference to "pay for time lost."

Even if "pay for time lost" could be impliedly read back into the RRTA, that term does not cover FELA judgments. It is a term of art originally understood to

cover coordination allowances under the Washington Agreement and, later, personal-injury *settlement* payments. At most, taxable "pay for time lost" encompassed voluntary payments from the employer to the employee, not compliance with court orders to satisfy FELA judgments from a tortfeasor to a victim.

Retreating further, petitioner looks to the SSA and FICA to define RRTA taxes. But, as the Eighth Circuit recognized, the cases on which petitioner relies are inapposite, and this Court has instructed that the textual differences between the RRTA and FICA control. *See Wisconsin Cent.*, 138 S. Ct. at 2070.

II. The district court also correctly ruled that the Internal Revenue Code's general exclusion of personal-injury awards from "income" in § 104(a)(2) applies to RRTA taxes, which also are "imposed on income." When Congress enacted the RRTA in 1937, it acted against the backdrop of § 104(a)(2)'s predecessor personal-injury exclusion. When Congress later incorporated certain other gross income exclusions into the RRTA's definition of taxable compensation, Congress intended to recognize exemptions for *both* employees and employers because both taxes are based on a specified percentage of "compensation." Through § 104(a)(2), however, Congress has always excluded personal-injury damages from employee income, including the RRTA's tax on that income. Petitioner's proposed rule would create the anomaly that railroad worker personal-injury awards are taxable under the RRTA even though the Code exempts all other such awards from the definition of "income."

III. Petitioner's and the government's appeal to *Chevron* deference is misplaced. The current regulations do not address the question presented, and the government's recent litigating positions are not

persuasive. In the more than 80 years that FELA and the RRTA have coexisted, petitioner and its *amici* cannot cite a single instance in which the IRS has imposed RRTA taxes on satisfaction of a FELA judgment.

ARGUMENT

I. A FELA JUDGMENT IS NOT TAXABLE COMPENSATION UNDER THE RRTA

A. The RRTA's Text Does Not Cover FELA Damages Judgments

1. The RRTA taxes remuneration "for services rendered"

a. The RRTA's text taxes remuneration for services rendered, not remuneration for other purposes. Statutory interpretation begins with the text; when Congress includes an explicit statutory definition, courts are obliged to follow that definition. *See Wisconsin Cent.*, 138 S. Ct. at 2070; *see also Burgess v. United States*, 553 U.S. 124, 130 (2008). Congress defined taxable compensation under the RRTA as remuneration "for services rendered." That phrase therefore "limits the kinds of remuneration that will qualify for taxation." *Wisconsin Cent.*, 138 S. Ct. at 2071.

The services-rendered limitation appears in multiple places in the RRTA. The provision defining the tax rate imposed on employee income states: "**Tier 1 tax.**—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee *for services rendered* by such employee." 26 U.S.C. § 3201(a) (emphasis added). The Tier 2 tax likewise "impose[s]" a tax on employee "income" as a percentage

of "compensation . . . *for services rendered*." *Id.* § 3201(b) (emphasis added).

Congress reinforced the services-rendered limitation in defining "compensation," the term that constitutes the tax base for determining Tier 1 and 2 taxes. RRTA "compensation" means "any form of money remuneration paid to an individual *for services rendered* as an employee to one or more employers." *Id.* § 3231(e)(1) (emphasis added). Thus, both the tax-imposing provision and the provision defining the tax base specify that employee taxes under the RRTA apply only to payments "for services rendered."

The ordinary meaning of "render services" refers to the performance of services for consideration. To "render" is to "give" or "furnish for consideration." *Webster's New International Dictionary* 2109 (2d ed. 1937). To render "services" means to provide "labor for the benefit of another, or at another's command." *Id.* at 2288. The RRTA specifies that an employee is in "service" when "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" and "he renders such service for compensation." 26 U.S.C. § 3231(d)(1), (2).

b. Congress's explicit limitation to remuneration "for services rendered" is consistent with the ordinary meaning of "remuneration" at the time of enactment as "recompense for services." 2 *New Century Dictionary of the English Language* 1520 (1934); *see also id.* (to remunerate means "[t]o requite, recompense, or reward (a person) for services, work, trouble, etc."); 8 *Oxford English Dictionary* 439 (1st ed. 1933) (defining "[r]emunerate" as "[t]o repay, requite, make some return for (services, etc.)" and "to pay (one) for services rendered or work done"); *Black's Law Dictionary* 1528 (3d ed. 1933) ("'remuneration' means a *quid pro quo*,"

that is, "whatever consideration he gets for giving his services"); 3 Frederick Stroud, *Judicial Dictionary* 1708 (2d ed. 1903) (same).[8]

Congress could have chosen to tax other types of remuneration, such as for expenses or jury service. The RRA, for instance, makes military service count toward creditable compensation "in the same manner as though military service were service rendered as an employee." 45 U.S.C. § 231b(i)(2). No similar provision exists to expand the scope of RRTA taxable compensation.

Congress's choice among alternative definitions of "compensation" also demonstrates its intent to tax pay for services and not other types of payments. Contemporaneous dictionaries defined "compensation" as encompassing not only payment for services but also compensation for loss. For example, *Black's Law Dictionary* defined "compensation" as not only "[t]he remuneration or wages given to an employee," such as "[s]alary, pay, or emolument," but also "[i]ndemnification; payment of damages; making amends; . . . that which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 377-78; *see also* C. Martin Alsager, *Dictionary of Business Terms* 67 (1932) ("compensation" means "[t]hat which is accepted as an equivalent for loss, privation, or services rendered; . . . indemnification; recompense; . . . restoration"); 2 *Oxford English Dictionary* 717-18 ("compensation" means "[t]hat which is given in

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[8] Congress's modifying preface of "money remuneration" with "any form" is irrelevant here. Whether a railroad pays its employees in "coins, paper currency, [or] checks," *Wisconsin Cent.*, 138 S. Ct. at 2071, such remuneration is taxable only if it is "for services rendered."

recompense . . . remuneration," as well as "[a]mends or recompense *for* loss or damage").

Among the ordinary meanings for "compensation" at the time, Congress could have chosen "an equivalent for loss [or] privation." Alsager, *Dictionary of Business Terms* 67. But "Congress did not adopt that ready alternative." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). Instead, Congress specifically defined "compensation" under the RRTA as "remuneration for services rendered." "That drafting decision" deserves respect. *Id.*

c. Petitioner (at 21-22) and the government (at 13) erroneously argue that several statutory exemptions to the RRTA's definition of "compensation" imply a broader understanding of that term. In fact, the exemptions Congress created confirm what the general definition says: taxable compensation is limited to "remuneration for services rendered."

Congress exempted from the RRTA's definition of taxable "compensation" payments made to an employee "under a plan or system established by an employer . . . on account of sickness or accident disability." 26 U.S.C. § 3231(e)(1)(i). For Tier 1 taxes, Congress also exempted from compensation certain disability benefits under the RRA and sickness benefits resulting from on-the-job injury under the RUIA. *Id.* § 3231(e)(4)(A)-(B). Unlike damages for negligence, sickness and disability benefits are part of an employee's package of compensation for rendering services. Under the RRA, annuities are provided for employees who have "render[ed] compensated service," 45 U.S.C. § 231a(e)(1), and benefits "accrue[]" based on "years of service" and disability, *id.* § 231a(a)(1). Similarly, an employee must be paid a certain amount of compensation for services rendered before receiving

sickness benefits under the RUIA. *Id.* §§ 351(i), 352(a)(1)(B), 353. Those payments are "for services rendered" and thus otherwise would be taxable compensation if Congress had not exempted them.[9]

2. A FELA damages award is not remuneration for services rendered

In ordinary usage, "remuneration for services rendered" does not encompass a damages judgment for injuries caused by a tortfeasor's breach of duty. When an employer satisfies a FELA damages award, it pays for negligence, not "for services rendered." "In legal parlance, the term 'damages' refers to money awarded as reparation *for injury resulting from breach of legal duty*." *Bowen v. Massachusetts*, 487 U.S. 879, 913 (1988) (Scalia, J., dissenting) (emphasis added) (collecting sources). FELA damages compensate for an injury from employer negligence that the law says the employer should not have committed. *See Winfield*, 244 U.S. at 164 (Brandeis, J., dissenting) (FELA liability is "a penalty for wrongdoing" and a "remedy" that "mak[es] the wrongdoer indemnify him whom he has wronged").

Damages for past wage loss under FELA also are not remuneration for services rendered. As the Eighth

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[9] Congress also exempted from RRTA compensation payments "received under a workmen's compensation law." 26 U.S.C. § 3231(e)(4)(A)(i). This Court has held that FELA preempted the field of remedies for railroad employees injured in interstate commerce, leaving to the States only actions for injuries occurring in intrastate employment. *See New York Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 147-54 (1917). When applicable, § 3231(e)(4)(A)(i) is not superfluous because employees receive state workmen's compensation benefits for services rendered. *See, e.g.*, Minn. Stat. § 176.011(9) (defining "[e]mployee" as "any person who performs services for another for hire").

Circuit explained, "[d]amages for lost wages . . . compensate the employee for wages the employee should have earned had he been able to render services." App. 19a-20a.[10] In his separate opinion in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), Justice Scalia similarly explained that "damages awards compensating an employee for lost wages" are "not" FICA "'wages' within the normal meaning of that term." *Id.* at 221 (Scalia, J., concurring in the judgment) (emphasis omitted).[11] The same reasoning applies to "compensation," which plays the same role as FICA wages in the RRTA's parallel statutory scheme.

B. Petitioner's Invocations Of Different Statutes To Define The RRTA Lack Merit

Petitioner's principal submission (at 18) is that the RRTA's statutory language is "not so plain" and that compensation under that Act should be defined by resort to other statutes. That argument fails.

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[10] Contrary to petitioner's assertion (at 21), the Eighth Circuit did not "add words" to the statute when it explained that "[d]amages for lost wages are, by definition, remuneration for a period of time during which the employee did not actually render any services." App. 19a-20a. The court used the word "actually" as a point of emphasis, to underscore that the statute means what it says. *See Carcieri v. Salazar*, 555 U.S. 379, 392-93 (2009).

[11] *Cleveland Indians* concerned a grievance settlement agreement, and the parties "stipulated that the settlement payments awarded . . . qualif[ied] as 'wages' within the meaning of FICA." 532 U.S. at 205. The Court did not consider the question presented here: whether satisfaction of a FELA judgment for personal physical injuries counts as "compensation," the RRTA's equivalent of FICA "wages."

1. The inclusion of "pay for time lost" in the RRA does not support reading the RRTA to tax FELA damages awards for past wage loss

Petitioner (at 23-34) and the government (at 20-30) contend that the Court should insert back into the RRTA's definition of compensation a term – "pay for time lost" – that is not in the current version of that statute (and was completely deleted from § 3231(e)(1) & (2) by 1983). That argument lacks merit. First, the RRTA does not tax, and cannot be read impliedly to tax, "pay for time lost." Second, even if the RRTA were read to tax "pay for time lost," that term does not reach satisfaction of a FELA judgment.

a. The RRTA does not tax "pay for time lost"

The RRTA's definition of compensation does not contain "pay for time lost." Those words do not appear in the statute. *See Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

Petitioner and the government nevertheless insist this Court must define the RRTA by looking to the RRA, which defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, *including remuneration paid for time lost as an employee*." 45 U.S.C. § 231(h)(1) (emphasis added). Petitioner (at 23) and the government (at 22) unpersuasively argue that Congress's use of the word "including" in the RRA means pay for time lost is an illustrative example of "remuneration for services rendered" and thus part of the RRTA's definition even though Congress took out the "time lost" clause.

i. "Pay for time lost" is not a form of remuneration for services rendered

Other provisions of the RRA reinforce the conclusion that remuneration "for services rendered" does not include pay for "time lost" from work. For calculating creditable compensation toward an annuity, the RRA defines "years of service" as "the number of years an . . . employee shall have rendered service to one or more employers for compensation *or received remuneration for time lost*." 45 U.S.C. § 231(f)(1) (emphasis added); *see also id.* § 231b(i)(2) (using similar phrasing – "or lost time" – to define "years of service" for computation of annuities). The use of the disjunctive "or" demonstrates Congress understood "remuneration for time lost" to be different from "compensation" for having "rendered service."

That understanding was clear in 1946 when Congress amended the RRTA: In resisting expanding "pay for time lost" to encompass personal-injury settlements, the AAR, *amicus* here, argued settlement payments were "compensation for injury" and "not remuneration for either services *or for lost time*." AAR Statement at 575 (emphasis added). *See Wisconsin Cent.*, 138 S. Ct. at 2070 (courts must interpret statutory words "consistent with their ordinary meaning at the time Congress enacted the statute") (alteration omitted).

Petitioner misreads (at 28) the RRTA's history in arguing that Congress added "pay for time lost" as an example of remuneration for services rendered. The House and Senate Reports indicate the change from "active service" (in 1935) to "services rendered" (in 1937) was meant to make clear "that compensation received by an employee in respect of months during which he was ill or on vacation is to be included in the compensation of the employee's tax liability." S. Rep.

No. 75-818, at 4; *accord* H.R. Rep. No. 75-1071, at 5-6 (same). Meanwhile, pay for time lost was distinct; it was not for active service or for services rendered.[12] Pay "for time lost" was a term of art Congress added in 1937 to reflect the 1936 Washington Agreement, which ensured railroad workers would receive a "coordination allowance" when workers were "deprived of employment" from railroad consolidation. *See supra* p. 9. Although affected employees could not work, the coordination allowances counted as "remuneration paid for time lost" and thus gave workers credit toward an annuity. "Even the [AAR] seems to have understood all this back in [1946]." *Wisconsin Cent.*, 138 S. Ct. at 2072; *see* AAR Statement at 574 ("that is a definite concept; a payment for lost time").

ii. "Pay for time lost" expands the definition of compensation

In the RRA's definition of "compensation," the phrase "including remuneration paid for time lost as an employee," 45 U.S.C. § 231(h)(1), *adds* to the ordinary meaning of "remuneration for services rendered." Congress used the term "including" to signal the *addition* of a discrete item, not an illustration of an otherwise subordinate element. Dictionary definitions, statutory examples, and judicial interpretations all confirm that conclusion.

First, contemporaneous dictionary definitions confirm that "including" signals an addition. *See Black's Law Dictionary* 943 ("*Including* may, according to

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[12] Petitioner (at 21) and the government (at 23) argue that taxable compensation is not confined to amounts paid for active service, and so must include pay for time lost. That argument is a strawman. Remuneration "for services rendered" can cover pay a railroad worker receives for time not actively working, such as vacation pay or sick pay. *See infra* p. 37. But that term is not so broad as to encompass damages for negligence.

context, express ar enlargement and have the meaning of *and* or *in addition to* . . . ."); 2 Stroud, *Judicial Dictionary* 945 ("'Include' is very generally used in Interp Clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also, those things which the interp clause declares that they shall include."); *see also* 1 *New Century Dictionary* 809 ("include" "*often* [means] to contain as a subordinate element," but also means to "involve as a factor" and "to place in an aggregate, class, category, or the like") (emphasis added).

Second, other statutory examples show Congress's use of "including" to expand a defined term beyond its ordinary meaning. For example, FELA defines "common carrier" to "include" entities "charged with the duty of the management and operation of the business of a common carrier." 45 U.S.C. § 57. The word "include" in that context *adds* entities to the definition beyond the natural meaning of "common carrier."

Another clear example is the so-called "situs" requirement in the Longshore and Harbor Workers' Compensation Act ("LHWCA"). That provision states:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area* customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4) (emphasis added). The items introduced by the word "including" (pier, wharf, etc.) are

not encompassed within the noun that precedes them ("navigable waters"); they add to the ordinary understanding of that term.[13] The U.S. Code – past and present – contains many other similar examples showing that Congress uses "including" to expand the dictionary definition of a term.[14]

Third, this Court long has recognized Congress's use of "including" in an expansive sense. More than a century ago, this Court noted that "including" "may have the sense of addition . . . and of 'also.'" *Montello Salt Co. v. Utah*, 221 U.S. 452, 464-65 (1911); *see also id.* at 462-63 ("'We think the word "including" was used as the equivalent of "also," a sense in which it is frequently used in tariff acts.'") (quoting *United States v. Pierce*, 147 F. 199, 201 (2d Cir. 1906) (per curiam)). Just last Term, this Court recognized that "use of the word 'include' is not literal – any more than when Congress says something like "'a State "includes"

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[13] In *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), which petitioner cites (at 24), the Court interpreted LHWCA's separate "status" requirement, which provides that "[t]he term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3). In that provision, the Court "understood the word 'including' to indicate that 'longshoring operations' are part of the larger group of activities that make up 'maritime employment.'" 444 U.S. at 77 n.7. In the context of the *situs* requirement – which the Court made clear is "distinct," *id.* at 78, and did not have occasion to interpret, *see id.* at 77 n.6 – an "adjoining pier" is not "one example" of navigable waters.

[14] *See, e.g.*, 42 U.S.C. § 6903(23) ("The term 'resource recovery system' means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues."); 2 U.S.C. § 1301(4) ("The term 'employee' includes an applicant for employment and a former employee.").

Puerto Rico and the District of Columbia.'" *Stapleton*, 137 S. Ct. at 1658 (quoting 29 U.S.C. § 1002(10)).[15]

In short, Congress's use of "including" does not support the assertion that "pay for time lost" is a "form of money remuneration for services rendered." U.S. Br. 26. Consequently, when Congress deleted "including remuneration paid for time lost" from the RRTA's definition of compensation, it removed a discrete element, not an illustrative example otherwise already encompassed within the meaning of "remuneration for services rendered."

iii. Congress amended the RRTA to remove "pay for time lost"

In 1975 and 1983, Congress removed all references to "pay for time lost" from the RRTA's definition of compensation. *See supra* pp. 11-12. "'When Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect.'" *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). Moreover, this Court presumes that Congress acts purposefully in its disparate inclusion or exclusion. *See Burlington N. & S.F. Ry. Co. v.*

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[15] *Groman v. Commissioner*, 302 U.S. 82 (1937), which the government cites (at 22), confirms that "includes" can "enlarge the connotation" of a defined term beyond "common usage." 302 U.S. at 86. Other cases merely explain that the word "includes" does not delimit a definition. *See Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (declining to read "including" as delimiting an exemption's scope); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) ("includes" does not "cabin a definition"). That proposition is uncontroversial and established by statute. *See* 26 U.S.C. § 7701(c). Those cases do not answer the interpretive question here – whether, in context, "including" means "among which are included" or "and also."

White, 548 U.S. 53, 63 (2006). That presumption is particularly apt here.[16]

As the government points out (at 5), Congress revised the RRTA's definition of compensation several dozen times and knew how to craft the term. In 1983, for example, at the same time Congress amended RRTA taxable compensation to delete pay for time lost, Congress expanded the definition of RRA creditable compensation to encompass certain separation, subsistence, and termination allowances. *See supra* p. 12. Petitioner's request that the Court read the pay-for-time-lost phrase into the RRTA, "when it is clear that Congress knew how to specify ['compensation'] when it wanted to, runs afoul of the usual rule that 'when the legislature uses certain language in one . . . statute and different language in another, the court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, at 194 (6th rev. ed. 2000)).

Seeking to avoid this conclusion, petitioner (at 29-34) and the government (at 23-30) try hard to explain why Congress might not have intended to remove "pay for time lost" from the RRTA. Petitioner suggests that Congress intended merely to change when, not whether, time lost is taxed. But the plain text reflects

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[16] The cases the government cites (at 25) do not undermine the rule that when Congress deletes statutory text the Court must give those amendments effect. In *Kellogg Brown & Root Services v. United States*, 135 S. Ct. 1970 (2015), the Court rejected the argument that deletion of the phrase "now indictable under any statute" "had the effect of sweeping in civil claims" because the operative term "offense" remained unchanged and the deletion had the effect of making the statute prospective. *Id.* at 1977-78. Here, respondent does not argue that Congress's deletion has the counterintuitive effect of expanding taxable compensation – just the opposite.

both changes and therefore indicates Congress meant to shift from an "earned" to a "paid" basis *and* remove time-lost payments from taxable compensation. Because "pay for time lost" is not an example of "remuneration for services rendered," petitioner and the government cannot explain why Congress had to remove not only the language about timing but also the reference to time-lost payments. In 1975, Congress replaced the first sentence of the definition of taxable compensation, thus signaling an intent to go beyond simply deleting the timing clause that specified when time lost "shall be deemed earned." *See supra* pp. 11-12.

The government argues (at 14, 29-30) that the Eighth Circuit drew "mistaken inferences" from the statutory history and that Congress would not have exempted time-lost payments "*sub silentio*." But Congress need not explain its intent in the legislative history for its amendments to have real and substantive effect. Reversing the Eighth Circuit's judgment would require this Court to read back into the statute words that Congress deleted. That, however, "'is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, [petitioner and the government] presum[e] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'" *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.)).

iv. The RRA and the RRTA are not *in pari materia*

Petitioner's assertion (at 25) that the RRTA and the RRA are *in pari materia* is incorrect and provides no basis for reading back into the RRTA the RRA's reference to "pay for time lost."

The RRA has the same relationship to the RRTA as the SSA does to FICA. *See Wisconsin Cent.*, 138 S. Ct. at 2071 (referring to FICA as RRTA's "companion statute" for "other industries"). This Court has expressly declined to construe *in pari materia* the SSA (the RRA's counterpart for non-railroad employees) and FICA (the RRTA's counterpart). *See Cleveland Indians*, 532 U.S. at 212-13. The Court explained that the "taxation and benefits eligibility contexts" are "discrete" and reflect different concerns. *Id.* at 213. Just as FICA taxes have "no direct relation" with Social Security benefits, *id.* at 212, so too RRTA "taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled" under the RRA, *Hisquierdo*, 439 U.S. at 574-75.[17]

The "pay for time lost" language is a significant linguistic difference between the RRTA and the RRA that precludes reading those statutes *in pari materia*. In addition, retirement benefits are based on "years of service" and levels of compensation, not taxes collected. 45 U.S.C. §§ 231a-231b. The Eighth Circuit correctly concluded these linguistic differences show

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[17] Indeed, Tier 2 tax rates fluctuate annually based on the ratio of benefits paid to the total asset value of the Railroad Retirement Account and the National Railroad Retirement Investment Trust (which depends on contributions *and* investment gains), at the aggregate, not employee, level. 26 U.S.C. § 3241.

Petitioner (at 1) expresses an interest in the solvency of the railroad retirement system, but offers no reason to suggest that the status quo – no RRTA taxes on FELA judgments – threatens the retirement system. The Board's latest annual report to Congress states that "the railroad retirement system will experience no cash-flow problems during the next 29 years." U.S. Railroad Retirement Bd., *2018 Annual Report* 2, https://rrb.gov/sites/default/files/2018-08/2018_Annual_Report.pdf.

that "'Congress intended its different words to make a legal difference.'" App. 21a (quoting *White*, 548 U.S. at 62-63 (declining to read statutes *in pari materia*)).

Congress's choice not to harmonize the RRTA and the RRA reinforces that conclusion. During the 1946 amendments, Congress considered codifying the RRTA's predecessor statute, the Carriers Taxing Act, as a part of the RRA and making all the definitions from the RRA "automatically applicable to the Carriers Taxing Act." S. Rep. No. 79-1710, pt. 2, at 9. In 1992, Congress also considered conforming RRTA "compensation" to the definitions of compensation in the RRA and the RUIA. *See* 138 Cong. Rec. at 2102 (Sec. 4108).[18] Congress did not adopt those proposals, however, confirming that the differences between the RRA's and the RRTA's definitions of "compensation" "convey differences in meaning." *Wisconsin Cent.*, 138 S. Ct. at 2071.

The authorities cited by petitioner and the government establish that the *in pari materia* canon applies only to interpreting provisions within the same statute[19] or to resolving ambiguities among statutes that address the same subject.[20] Reading statutes *in pari*

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[18] Congress defined "compensation" in the RUIA in yet another way, confirming that the linguistic differences between the RRTA and the RRA are intentional. 45 U.S.C. § 351(i)(1).

[19] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 & n.11 (1985) (reading "waters" within different provisions of the Clean Water Act *in pari materia*); *cf. Branch v. Smith*, 538 U.S. 254, 273-82 (2003) (plurality opinion interpreting provisions in Title 2 governing elections to the House of Representatives); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (interpreting provisions within the Bankruptcy Code).

[20] *See Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 164 (1872) (interpreting two duty acts *in pari materia*); *United States v.*

materia is inappropriate where, as here, the statutes are in different titles of the U.S. Code (Title 26 and Title 45), administered by different agencies (the Treasury Department and the Board) pursuant to different regulations, and address different subjects – "the discrete taxation and benefits eligibility contexts." *Cleveland Indians*, 532 U.S. at 213.

b. In any event, "pay for time lost" does not encompass satisfaction of a FELA judgment

The statutory history of the RRTA and the RRA reveals that the concept of "pay for time lost" does not reach satisfaction of a FELA judgment. The presence of that phrase in the RRA does not advance petitioner's argument for that reason as well.

In 1937, Congress included a reference to "pa[y] for time lost" in the RRTA's definition of compensation. § 1(e), 50 Stat. 436. In 1946, over the AAR's protests, Congress expanded "pa[y] for time lost" to include remuneration for "absence on account of personal injury." § 3(f), 60 Stat. 725. That broader definition encompassed payments for personal injuries in *settlement* of a FELA claim. *See supra* pp. 9-10 & n.7. There is no evidence, however, that Congress ever considered the satisfaction of a FELA *judgment* to be taxable under that broader (since eliminated) language.

Even the broadest definition of "pay for time lost" in effect from 1946 to 1975 would not have covered the damages judgment in this case because a settlement

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Stewart, 311 U.S. 60, 64 (1940) (construing Revenue Acts of 1916 and 1928 *in pari materia*); *cf. Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (rejecting *in pari materia* argument because, although 18 U.S.C. § 1952 and § 1953 were enacted simultaneously and address "broad, common goals," they "play different roles in achieving" them).

is fundamentally different from satisfaction of a FELA judgment. In settlements, the railroad ordinarily does not admit liability – it reaches a voluntary agreement with the employee in exchange for not accepting liability for negligence. By contrast, a *judgment* from a court following suit is an involuntary payment made as an order to redress negligence.

Contemporaneous enactments contain express references to judgments, which confirms that "pay for time lost" never encompassed satisfaction of a FELA judgment. In 1946, Congress simultaneously amended the RRTA, the RRA, and the RUIA. In the RUIA, Congress specified that the Board is entitled to reimbursement for "any sum or *damages* paid or payable to [an] employee . . . through *suit*, compromise, settlement, *judgment*, or otherwise on account of *any liability*." 1946 Act § 323, 60 Stat. 741 (emphases added).[21] Thus, the same Congress that amended the definitions of "compensation" in the RRTA and the RRA to have "pay for time lost" reach settlement payments for personal injuries simultaneously referred in the RUIA to "damages" and "judgment." Those linguistic differences reinforce the conclusion that pay for time lost does not reach satisfaction of FELA judgments. *See Kellogg Brown & Root Servs.*, 135 S. Ct. at 1977 (in determining that "offense" did not include "civil violation" in False Claims Act tolling provision, Court found it "revealing that Congress ha[d] used clearer and more specific language" to designate civil violations in contemporaneous antitrust tolling statute).

Congress could have chosen to tax FELA judgments but did not. If Congress had wanted to make FELA judgments subject to taxes, it could have defined

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[21] This language remains today at 45 U.S.C. § 362(*o*).

"compensation" as "remuneration for services rendered as an employee *and damages paid or payable to an employee through suit or judgment*." "That amendment would have accomplished exactly what [petitioner] argue[s] Congress intended[,] . . . [b]ut Congress did not adopt that ready alternative." *Stapleton*, 137 S. Ct. at 1659; *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (when legislators do not adopt "obvious alternative" language, "the natural implication is that they did not intend" the alternative). The wording Congress chose indicates its intent not to make satisfaction of FELA judgments taxable.

2. Decisions interpreting the Social Security Act and FICA likewise do not support reading the RRTA to tax FELA damages for past wage loss

"Reaching further afield," *Wisconsin Cent.*, 138 S. Ct. at 2073, petitioner relies on cases involving the SSA and FICA – *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), and *Quality Stores*. Those cases are inapposite and offer no reason to disregard the RRTA's plain language.

a. *Nierotko* represents a discredited analysis this Court subsequently limited. There, the Court addressed whether back pay awarded to a reinstated employee by the National Labor Relations Board counted as "wages" under the SSA. The SSA defined "wages" as "all remuneration for employment" and defined "employment" as "any service, of whatever nature, performed." 327 U.S. at 362-63. The government argued that, "[s]ince 'back pay' is not received for 'service performed,' it does not come within the statutory definition" of "wages." Social Security Bd. Br. at 4, No. 318 (U.S. filed Dec. 6, 1945), 1945 WL 48899. But the government also acknowledged that

the SSA's "humanitarian purpose" "would be advanced if workers [we]re not deprived of some of their old-age protection because they [we]re the victims of unlawful employer practices." *Id.* at 24.

Instead of following Congress's explicit statutory definition, the Court focused on the SSA's remedial purpose: the "very words 'any service . . . performed . . . for his employer,' *with the purpose of the Social Security Act in mind*[,] import breadth of coverage." 327 U.S. at 365 (emphasis added; ellipses in original). The Court held that back pay for the wrongful discharge period qualified as "wages" under the SSA. *Id.* at 369-70. Furthermore, despite statutory language specifying that "wages" were "to be 'paid' in certain 'quarters,'" the Court instead concluded it "ha[d] no doubt that [the back pay] should be allocated to the periods when the regular wages were not paid as usual." *Id.* at 370.

Fifty-six years later, *Cleveland Indians* limited *Nierotko* and undermined its reasoning. There, the issue was whether settlement payments should be taxed under FICA by reference to the year they were paid or the years in which they should have been paid. 532 U.S. at 205. The government argued that the plain language of the statute – "wages paid" – required taxes to be applied to the year the settlement payments were paid. *Id.* at 209. The company argued that, "[b]ecause *Nierotko* read the . . . 'wages paid' language for benefits eligibility purposes to accommodate an allocation-back rule for backpay, . . . the identical . . . 'wages paid' language for tax purposes must be read the same way." *Id.* at 212. The Court rejected that argument.

The *Cleveland Indians* Court recognized that *Nierotko* was not based on a literal construction of the

statutory text but "in all likelihood reflected concern that the benefits scheme created in 1939 would be disserved by allowing an employer's wrongdoing to reduce the quarters of coverage an employee would otherwise be entitled to claim toward eligibility" for benefits. *Id.* Thus, *Cleveland Indians* declined to follow *Nierotko* in interpreting *identical language* in FICA: "*Nierotko* dealt specifically and only with Social Security benefits eligibility, not with taxation." *Id.*[22]

Cleveland Indians makes clear that the *Nierotko* holding is an "exception" that does not apply here. *Id.* at 215-16. "[T]he concern that animate[d] *Nierotko's* treatment of backpay in the benefits context has no relevance to the tax side" of FICA, *id.* at 216, let alone any relevance to the tax implications under the RRTA of a plaintiff's FELA judgment – *Nierotko* says nothing about what counts as taxable "income" or "compensation" under the RRTA.

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[22] Despite *Nierotko*, the Court was "inclined to conclude, given *Nierotko's* lack of concern with taxation," that the statutory text itself required back pay to be taxed when "actually paid." 532 U.S. at 216. That reasoning further undermines *Nierotko*'s interpretive approach.

Although the *Cleveland Indians* Court ultimately deferred to the Treasury regulations, it did so for reasons that do not apply here. There, the Court noted that the tax provisions evidenced a "tension" between the "twin aims" of "efficiently administrable and fair" taxation. *Id.* at 218. Here, there is no such tension: holding that a FELA damages award is not subject to RRTA taxes is both administratively efficient and fair. Because it does not require ascertaining the amount of damages subject to tax, it is efficient. And because it ensures the jury's award is not subject to double taxation (*i.e.*, the taxes the jury deducted in calculating a net-of-taxes award, and the taxes petitioner would have this Court impose on respondent), it is fair.

Petitioner also relies (at 20) on *Quality Stores*, but that case is off point. There, the Court held that severance payments are taxable "wages" under FICA. As the Court explained, "[s]everance payments are made in consideration for employment – for a 'service . . . performed'" – and are thus FICA wages. 134 S. Ct. at 1400 (ellipsis in original); *see also id.* (severance packages are designed "to reward employees for a greater length of good service and loyalty"). Likewise, severance payments are remuneration "for services rendered" and so would be taxable under the RRTA. For similar reasons, vacation pay and sick pay are also remuneration "for services rendered" – those items of compensation accrue with service time. *See, e.g.*, *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 27-28 & n.3 (1967) ("vacation pay" "accrued" under collective-bargaining agreement). Those payments are not a mere gratuity, but rather part of a package of benefits to retain the employee in the employer's service. They are made in consideration for past or anticipated services and are thus "for services rendered." FELA damages, by contrast, are paid for the employer's breach of a legal duty that causes injury.

Quality Stores cited *Nierotko* only for the proposition that the term "wages" is interpreted broadly "in the Social Security statutory context." 134 S. Ct. at 1400; *see also id.* (emphasizing that *Nierotko*'s interpretation of "service" was "with respect to Social Security"). The Court did not cast any doubt on *Cleveland Indians* and did not reach the question presented here.

b. Petitioner (at 20 n.20) and the government (at 18-19) unpersuasively assert that "there is no meaningful textual difference" between FICA "wages" and RRTA "compensation."

Last Term, this Court in *Wisconsin Central* addressed some of the linguistic differences between FICA and the RRTA. Although those statutes share the same basic structure, with a tax imposed on income and a tax base defined as a subset of income, Congress used different language to "carefully distinguish" the respective tax bases. 138 S. Ct. at 2073. The Court noted and explained the difference between "*all* remuneration" in FICA and "*money* remuneration" in the RRTA. *Id.* at 2071.

The RRTA's focus on "services rendered" is another significant difference between the two statutes. FICA's tax on income applies to "all remuneration for employment," 26 U.S.C. § 3121(a), which Congress defined *broadly* as "any service, of whatever nature, performed . . . by an employee for the person employing him," *id.* § 3121(b). By contrast, the RRTA's tax on income applies to "money remuneration paid to an individual for services rendered as an employee," *id.* § 3231(e)(1), and includes a particularized definition of "service," *id.* § 3231(d). Under the RRTA, an individual "is in the service of an employer" when he "renders such service for compensation" and is: "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service"; "rendering professional or technical services and is integrated into the staff of the employer"; or "rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations." *Id.* § 3231(d)(1), (2).

FICA does not define "service" and includes no similar "focus on the authority and control that an employer exercises over an employee in determining whether the employee is performing a 'service.'" *Union Pac. R.R. Co. v. United States*, 865 F.3d 1045,

1053 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2709 (2018). In applying the statutory text in *Union Pacific*, "the Eighth Circuit w[as] right." *Wisconsin Cent.*, 138 S. Ct. at 2074. *Union Pacific* informed the Eighth Circuit's decision here. App. 20a.

Congress's intent to establish different definitions in FICA and the RRTA is clear. Consider § 3231(e)(2)(C)(i), where Congress incorporated a provision of FICA into the RRTA but expressly substituted the RRTA's definition of "services" with "employment" "each place it appears." That provision shows, contrary to the government's contention (at 16-17), Congress's intent to draw a distinction between the language in FICA and the RRTA.

In arguing that *Nierotko* and *Quality Stores* control, petitioner functionally asks this Court to expand the phrase "services rendered" in the RRTA to match FICA's broader definition of "wages." But Congress's choice to make "compensation" a "narrower term" "requires respect, not disregard." *Wisconsin Cent.*, 138 S. Ct. at 2072.[23]

In any event, personal-injury damages are not FICA "wages" either. Justice Scalia reached that conclusion in *Cleveland Indians*, and this Court has never held to the contrary: *Nierotko* concerned Social Security benefits, and *Quality Stores* concerned severance payments. Petitioner's effort to define the RRTA taxable compensation via other statutes fails.

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[23] Honoring the difference in the RRTA's definition of taxable compensation is also consistent with respecting the differences Congress has drawn between railroad-specific statutes and statutes governing other industries. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971).

C. The Court Of Appeals' Approach Advances Congress's Purposes

1. Congress has enacted several statutes reflecting special solicitude for railroad workers. FELA is a "humanitarian" statute that this Court has "liberally construed . . . to further Congress' remedial goal" to facilitate "recovery by injured workers." *Gottshall*, 512 U.S. at 542-43; *see also Winfield*, 244 U.S. at 162 (Brandeis, J., dissenting) (FELA was "emergency legislation" given the hazards railroad workers face). The RRA also is a remedial statute Congress designed to supplant private railroad retirement and disability pensions that proved unreliable. *See Wisconsin Cent.*, 138 S. Ct. at 2070. Subjecting FELA judgments to taxes is inconsistent with those statutes.

2. Imposing RRTA taxes on FELA damages awards also creates "incentives for strategic behavior that Congress did not intend." *Cleveland Indians*, 532 U.S. at 216-17. Petitioner and its *amicus*, the AAR, seek a result that would *increase* their tax liability: If petitioner prevails, it will owe employer excise taxes in this case, *see* 26 U.S.C. § 3221, and for all future FELA judgments.

The railroads are pursuing that counterintuitive objective because subjecting FELA judgments to RRTA taxes gives railroads additional bargaining leverage in settlement negotiations with injured workers. When the railroad satisfies a judgment, whatever amount the jury allocates to past wage loss would be subject (under petitioner's proffered rule) to taxation. If the parties enter into a (pre- or post-trial) settlement agreement, however, they can allocate less of the railroad's settlement payment to taxable past wage loss and more to other categories not subject to RRTA taxes. Therefore, the railroad can use the threat of tax

liability to coerce a worker to accept a settlement less than an actual or potential damages award.

3. Petitioner's proposed rule creates unnecessary conflict with well-established FELA jury instructions, which state that damages awards are not subject to federal and state income taxes. *See Liepelt*, 444 U.S. at 498. That instruction is necessary because juries otherwise might "assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Id.* at 496.[24] At petitioner's request, the district court gave the model Eighth Circuit jury instruction, JA91a, ensuring that the jury was not confused about taxation.

Under petitioner's proposed rule, the jury will be instructed that the verdict is subject to some taxes (RRTA) but not to others (state and federal income). That approach is unnecessarily confusing to jurors and undermines Congress's goals in FELA cases of compensating plaintiffs. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537 (1983) (citing *Liepelt* and noting that lost-wages awards "should be estimated in after-tax terms"). The Court should reject that inequitable result, which contravenes the RRTA's plain text and the jury's determination.

II. A FELA JUDGMENT IS NOT TAXABLE INCOME UNDER THE RRTA

The district court correctly ruled that a separate provision of the Code – § 104(a)(2) – excludes satisfaction of a FELA judgment from RRTA taxes. That

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[24] In its extended discussion of taxation on FELA judgments, the *Liepelt* Court never mentions RRTA taxes. 444 U.S. at 490-98. That omission indicates no such taxation existed at the time.

provision provides an independent basis for affirming the judgment.

A. Section 104(a)(2) Excludes Personal-Injury Damages From The RRTA's Tax On Employee Income

1. Section 104(a)(2) provides in pertinent part that "gross income does not include . . . the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). The Internal Revenue Code defines "gross income" in pertinent part as "all income from whatever source derived." *Id.* § 61. The effect of those provisions taken together is that the category of "all income" does *not* include damages for personal physical injuries.

Section 104(a)(2)'s exclusion from income for personal-injury damages applies to the RRTA's tax on employee income. The RRTA tax at issue is expressly "imposed on the *income* of each employee." 26 U.S.C. § 3201 (emphasis added); *see Wisconsin Cent.*, 138 S. Ct. at 2070 ("Under the [RRTA's] terms, . . . employees pay a tax based on employees' incomes.").[25] Congress's

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[25] Congress's choice in § 3201 to structure the RRTA employee tax as a tax on income as measured by a percentage of compensation accords with its making compensation a subset of income. *See* 26 U.S.C. § 61(a)(1) (defining "gross income" to include "[c]ompensation for services"); *Rowan Cos. v. United States*, 452 U.S. 247, 254 (1981) (recognizing that the counterpart to RRTA "compensation" – FICA "wages" – is a subset of income).

By contrast, the RRTA's employer tax is an "excise tax." 26 U.S.C. § 3221. *See Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 617-19 (1895) (discussing traditional distinction between direct taxes (of which income taxes are a subtype) and "duties, imposts, and excises").

decision to impose the RRTA's employee tax on income triggers the application of § 104(a)(2), which specifies that personal-injury damages are not income for purposes of the Code.

2. The RRTA's statutory history reinforces the conclusion that § 104(a)(2)'s exclusion applies to RRTA employee taxes. The RRTA consistently has levied a tax on employee "income." The 1935 statute was entitled "An Act: To levy an excise tax upon carriers and *an income tax* upon their employees, and for other purposes." 49 Stat. 974 (emphasis added). The statute accordingly "levied, collected, and paid *upon the income* of every employee" a tax. *Id.* § 2, 49 Stat. 975 ("INCOME TAX ON EMPLOYEES") (emphasis added).

The 1937 Carriers Taxing Act, the predecessor to the current RRTA, was also titled "An Act: To levy an excise tax upon carriers and certain other employers and *an income tax* upon their employees, and for other purposes." 50 Stat. 435 (emphasis added). It likewise "levied, collected, and paid *upon the income* of every employee a tax." *Id.* § 2(a), 50 Stat. 437 ("INCOME TAX ON EMPLOYEES") (emphasis added). When Congress passed the 1937 Act, FELA had been on the books for nearly 30 years, and the U.S. tax code had exempted personal-injury damages awards from *income* tax since 1919. *See* 1918 Revenue Act § 213(b)(6), 40 Stat. 1066. If Congress had intended to tax FELA damages awards in the Carriers Taxing Act of 1937 – an act that "levied" a tax "upon . . . *income*" – it would have done so expressly. *See Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (implied repeals disfavored).

In 1946, when it amended the RRTA, Congress retained the tax on income: "In addition to other

taxes, there shall be levied, collected, and paid *upon the income* of every employee a tax . . . ." 1946 Act § 3(a), 60 Stat. 723 (emphasis added).

In 1954, although Congress modified the phraseology, the RRTA's employee tax remained an income tax: "Rate of Tax. In addition to other taxes, there is hereby *imposed on the income of every employee* a tax . . . ." Internal Revenue Code of 1954, ch. 736, § 3201, 68A Stat. 1, 431 (emphasis added). Since 1954, that phrasing has remained. This consistent statutory language confirms that the RRTA tax is imposed on income.[26] Because § 104(a)(2) excludes damages for personal physical injuries from income, it excludes those awards from taxable income under the RRTA.

B. Applying § 104(a)(2) To The RRTA's Employee Tax Comports With The Prevailing Approach Under FICA

1. FICA's structure parallels the RRTA's: the employee tax is also "imposed on the income" of individuals. 26 U.S.C. § 3101(a). In the FICA context, this Court has recognized that "wages" – the term that defines the FICA tax base – "is a narrower concept than 'income.'" *Rowan*, 452 U.S. at 254; *see also Central Illinois Pub. Serv. Co. v. United States*, 435 U.S. 21, 29 (1978) (explaining that "wages" subject to withholding is "much narrower than subjectability to income taxation").

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[26] In its reply below (Cross-Appellant C.A. Reply Br. 18), petitioner incorrectly suggested that Congress's reference to "income" merely signals the constitutional power under which Congress acted. "It was not the purpose or effect of [the Sixteenth] amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes." *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926).

In *Rowan*, the Court addressed whether "wages" encompassed the value of meals and lodging, which under § 119 of the Code are (like personal-injury damages) excluded from gross income. *See* 452 U.S. at 248, 251 & n.8. This Court accepted the argument that "[b]ecause 'wages' is a narrower concept than 'income' . . . the value of the meals and lodging . . . – which the Government acknowledge[d] is not 'income' [under § 119] – therefore cannot be 'wages' under FICA." *Id.* at 254. Although there (as here) the government contended that FICA "compose[d] a distinct system of taxation to which the rules of income taxation, such as the exclusion . . . in § 119, do not apply," the Court was "not persuaded by this contention." *Id.* at 257. The Court indicated that principles from income taxation apply to employment taxes. *See id.* at 257-58 (Congress did not necessarily "intend[] to tax remuneration in kind without regard to principles developed under income taxation," such as the exclusion found in § 119). The Court therefore invalidated Treasury regulations that were "far from consistent" and would have required otherwise. *Id.* at 258-59, 263.

Following that reasoning, the courts of appeals consistently have held that § 104(a)(2) excludes damages awards from FICA taxes. *See Gerbec v. United States*, 164 F.3d 1015, 1025-27 (6th Cir. 1999); *Dotson v. United States*, 87 F.3d 682, 689-90 (5th Cir. 1996); *Redfield v. Insurance Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991); *Anderson v. United States*, 929 F.2d 648, 653-54 (Fed. Cir. 1991).[27] IRS pronouncements are to like effect. *See supra* pp. 6-7.

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[27] The government's attempt (at 32) to distinguish *Gerbec* and *Dotson* is unavailing. In those cases, remand was appropriate to determine what portion of the award was not "on account of personal physical injuries," and so not excludable from income or

2. The Solicitor General tries (at 32) to distance himself from authorities recognizing that § 104(a)(2) applies to FICA wages, as well as the brief he approved in the Eighth Circuit below, which argued that § 104(a)(2) applies to FICA wages but not RRTA compensation.[28] The government, however, offers no persuasive reason why this Court should disregard the settled logic of those authorities.

Petitioner (at 25-26) and the government (at 33) insist RRTA taxable compensation and RRA creditable compensation should be symmetrical. But that is not the scheme Congress established. For instance, military service can count toward a railroad employee's "years of service" for an RRA annuity. 45 U.S.C. § 231b(i)(2). Military service, however, is not taxed under the RRTA, and so the railroad does not pay the employer excise taxes that help to fund the more generous railroad retirement pensions. Congress is presumed to have made an intentional choice in defining creditable and taxable compensation. *See Hisquierdo*, 439 U.S. at 574-75 (no direct relationship

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from FICA wages under § 104(a)(2). Here, there is no question that Loos's past wage loss is "on account of personal physical injuries," and so § 104(a)(2) excludes the damages from both income and RRTA taxes. *See Commissioner v. Schleier*, 515 U.S. 323, 329 (1995).

[28] Below, the government argued that it would be "reasonable" and "sound policy" to withhold RRTA taxes from FELA judgments, but not FICA taxes from other personal-injury awards, because railroad employees receive credit for such payments toward an annuity whereas workers in other industries do not. U.S. C.A. Br. 13-16. Petitioner makes a similar argument (at 47). That argument ignores the special treatment Congress has given to railroad workers in an array of statutes, including the RRA, which provides "a pension often more generous than the social security system supplies employees in other industries." *Wisconsin Cent.*, 138 S. Ct. at 2070.

between taxes and benefits). And the Court may not "rewrite the statute that Congress has enacted." *Dodd v. United States*, 545 U.S. 353, 359 (2005).

C. Petitioner's Responses Lack Merit

Petitioner and the government do not mention that the RRTA tax is "imposed on income." That omission is dispositive, for courts "'are obliged to give effect, if possible, to every word Congress used.'" *Carcieri*, 555 U.S. at 391 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Instead of the text, petitioner and the government rest on erroneous structural arguments.

1. The textual relationship of the RRTA to § 104(a)(2), not their location in the Code, governs

Petitioner suggests (at 38) that because § 104(a)(2) appears in a different part of the Internal Revenue Code it does not apply to the RRTA. Congress, however, expressly has forbidden reading significance into the "location or grouping of any particular section or provision or portion" of the Internal Revenue Code. 26 U.S.C. § 7806. "Congress codified [the personal-injury-damages exclusion] in § [104(a)(2)] of the income-tax provisions of the Code . . . . But that does not mean that Congress implicitly foreclosed the applicability of the rule to other provisions of the Code." *Rowan*, 452 U.S. at 258 n.13. The statutory text is clear: the RRTA's employee tax is imposed on income, and so § 104(a)(2) applies.

2. Cross-references to fringe-benefit exclusions do not negate the general exclusion for personal-injury damages

Contrary to petitioner's suggestions (at 40-42), Congress's cross-references in the RRTA to certain other exclusions from gross income do not indicate

Congress meant to deprive railroad workers of the benefit of § 104(a)(2) in obtaining payment in satisfaction of FELA judgments. If anything, the text of those exclusions undermines petitioner's position: the provisions expressly refer to exclusions from "income," rather than "gross income," thus showing Congress understands gross income exclusions to apply to all income. *See* 26 U.S.C. § 3231(e)(5)-(6), (9)-(11). Those legislative choices negate petitioner's only textual theory for avoiding the application of § 104(a)(2) to the RRTA's employee tax.

a. When Congress expressly incorporated gross income exclusions into the RRTA's definition of "compensation," it made those exclusions applicable to both employee and employer taxes. For those taxes, Congress set the tax base as a specified "percentage" of "compensation." *See* 26 U.S.C. §§ 3201(a)-(b) (employee tax), 3221(a)-(b) (employer tax). By contrast, exclusions not expressly cross-referenced – like § 104(a)(2) – apply only to the *employee* tax because that tax is imposed on "income," *id.* § 3201(a)-(b), whereas the employer tax is "an excise tax," *id.* § 3221(a)-(b). If Congress had wanted § 104(a)(2) to exclude personal-injury damages from railroad *employer* taxes, it would have incorporated that exclusion into the RRTA's definition of taxable compensation. *See White*, 548 U.S. at 63 (disparate inclusion and exclusion presumed intentional).[29] Therefore,

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[29] Although at one time Congress made certain portions of FELA settlements taxable under the RRTA as "pay for time lost" to assist railroad workers in achieving annuities, Congress has since deleted that exception to the § 104(a)(2) exclusion. *See supra* p. 12.

petitioner and the government are mistaken in arguing that applying § 104(a)(2) to the RRTA renders the cross-references meaningless.

b. Closer consideration of the exemptions on which petitioner relies confirms that Congress did not mean to deny the operation of § 104(a)(2) to injured railroad workers. Each of the exclusions Congress cross-referenced in the RRTA concerns fringe benefits that an employer provides to an employee, such as stock options, provision of meals and lodging, employee achievement awards, and education assistance. *See* 26 U.S.C. § 3231(e)(5)-(6), (9)-(11). Those voluntary transfers from the employer enhance the employer-employee relationship – they are forms of money remuneration for services rendered. Without cross-references, these items ordinarily would fall within the RRTA's definition of taxable compensation as "any form of money remuneration paid to an individual for services rendered as an employee." *Id.* § 3231(e)(1). By contrast, a FELA damages award is not "for services rendered" – it is for loss, privation, and injury. Congress therefore had no need specifically to exclude what already falls outside the RRTA's definition of compensation. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (negative implication canon applies to terms "understood to go hand in hand").

Moreover, the timing and context of Congress's cross-references to these gross income exclusions in the RRTA further confirm that Congress did not mean to negate the application of § 104(a)(2) to the RRTA's tax on employee income. The following table shows when and where Congress added cross-references to gross income exclusions in the RRTA and FICA.

Subject

Exclusion from Income: Date Added	RRTA Section: Date Added	FICA Section: Date Added
Employee achievement awards		
§ 74(c): 1986	§ 3231(e)(5): 1986	§ 3121(a)(20): 1986
Amounts received under Federal or State student loan forgiveness		
§ 108(f)(4): 2004	§ 3231(e)(5): 2004	§ 3121(a)(20): 2004
Qualified scholarships		
§ 117: 1954	§ 3231(e)(5): 1984	§ 3121(a)(20): 1984
Fringe benefits		
§ 132: 1984	§ 3231(e)(5): 1984	§ 3121(a)(20): 1984
Employer-provided educational assistance		
§ 127: 1978	§ 3231(e)(6): 1984	§ 3121(a)(18): 1978
Value of meals and lodging furnished by employer		
§ 119: 1954	§ 3231(e)(9): 1989	§ 3121(a)(19): 1983
Medical savings account contributions		
§ 106(b): 1996	§ 3231(e)(10): 1996	not added
Employer contributions to health savings accounts		
§ 106(d): 2003	§ 3231(e)(11): 2003	not added
Qualified stock options		
§ 421(a), § 422(a)-(b), § 423(a)-(b): 1964	§ 3231(e)(12): 2004	§ 3121(a)(22): 2004

Congress cross-referenced each of these exclusions between 1978 and 2004 – some 40 to 70 years after the RRTA's enactment. In many of those provisions, Congress added cross-references to the RRTA or FICA at the same time that it *created* the gross income exclusion – *e.g.*, §§ 74(c), 106(b), 106(d), 108(f), 127, 132. That history shows that – in addition to applying the exclusion to the excise tax on employers – Congress was clarifying the tax on employee income, and not seeking indirectly to exclude exemptions not cross-referenced.[30]

If Congress had wanted § 104(a)(2) to apply only to taxes withheld under FICA but not the RRTA, it could have so designated. *Cf.*, *e.g.*, 26 U.S.C. § 3231(e)(3) (specifying that rule for cash tips applies "[s]olely for purposes of the taxes imposed by section 3201" of RRTA). Congress did not make that choice.

In the end, the purpose of exclusions is to reduce tax liability, not to increase it. By cross-referencing gross income exclusions in the RRTA, Congress made doubly sure that it *reduced* a railroad employee's potential tax burden. In adding the cross-references relating to fringe benefits, Congress evinced no intent indirectly to *increase* taxes on railroad employees who suffered physical injuries from employer negligence.

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[30] The statutes at issue in the cases petitioner cites (at 42) are fundamentally different – those statutes provided exemptions at the outset, not cross-references added later. *Elgin v. Department of Treasury*, 567 U.S. 1, 13 (2012), concerned 5 U.S.C. § 7703(b)(2), which, since the *inception* of the Civil Service Reform Act of 1978, has delimited the statutes under which an employee may seek judicial review outside the Federal Circuit. *United States v. Bess*, 357 U.S. 51, 57 (1958), did not involve cross-references added to an earlier-enacted statute, but rather the comparison of one statute with two other provisions enacted contemporaneously.

III. TREASURY HAS NOT ADDRESSED WHETHER A FELA JUDGMENT IS TAXABLE UNDER THE RRTA, AND ITS LITIGATING POSITIONS DO NOT WARRANT DEFERENCE

A. *Chevron* Deference Is Inappropriate In This Case

"[I]n light of all the textual and structural clues," there is "no ambiguity for the agency to fill." *Wisconsin Cent.*, 138 S. Ct. at 2074.[31] Even if the statute were ambiguous, the Treasury Department has not formally ruled on the precise question.

The current Treasury regulations state that "compensation" "has the same meaning as the term *wages* in section 3121(a)" of FICA, "except as specifically limited by the [RRTA]." 26 C.F.R. § 31.3231(e)-1(a)(1) (emphasis added). "Compensation" "includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost." *Id.* § 31.3231(e)-1(a)(4). The regulations do not speak to payments for personal injuries.

At one point, Treasury regulations specified that "compensation" included "a payment ... made to an employee *with respect to a personal injury* [that] includes pay for an identifiable period of absence from active service." Republication of Regulations, 25 Fed.

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[31] The government incorrectly says (at 11) that the Eighth Circuit "acknowledged that the Treasury Department's interpretations of the RRTA are entitled to deference under" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In fact, the court of appeals concluded that "the RRTA is unambiguous" and that therefore the regulations "receive no deference under *Chevron*." App. 24a.

Reg. 13,032, 13,067 (Dec. 20, 1960) (§ 31.3231(e)-1(b)(3)) (emphasis added). But the Secretary deleted that language in 1979. *See* Definition of Compensation for Purposes of the Railroad Retirement Tax Act, 44 Fed. Reg. 15,484, 15,484-85 (Mar. 14, 1979) (deleting subparagraph (b)(3)). Thus, even assuming an award of lost wages in a FELA judgment counts as such a payment, the current RRTA regulations do not attempt to impose taxes on satisfaction of that judgment. The Treasury Department has not since issued regulations or guidance indicating that it considers satisfaction of FELA judgments to be "compensation" or "income" taxable under the RRTA.

That change in the regulations underscores that the government has not "followed [its interpretation] consistently since the inception of the statute." *Wisconsin Cent.*, 138 S. Ct. at 2075 (Breyer, J., dissenting). Treasury is entitled to no deference when the regulations say nothing about FELA damages awards. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (when regulation "does not address the issue," it receives no deference).

B. The Regulations' Inclusion Of "Pay For Time Lost" Does Not Support Petitioner's Position

Petitioner (at 34-36) and the government (at 33-34) claim significance from the current regulations still including "pay for time lost" within the definition of compensation. That phrase does not include satisfaction of a judgment. *See supra* pp. 32-34.

Even assuming that "pay for time lost" encompasses a FELA damages award, the Treasury's inclusion of that language in its regulations is an impermissible interpretation of the statute, because the agency cannot rewrite the law by keeping the language

Congress removed. *Chevron* "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).[32]

C. The Revenue Rulings Do Not Support Petitioner's Argument

Contrary to petitioner's suggestion (at 43-44), the Revenue Rulings do not answer the question presented. Those rulings pertain to settlements, not FELA judgments. "[B]ecause neither revenue ruling is directly on point," the Eighth Circuit rightly gave them "no consideration." App. 24a n.11. In any event, IRS "interpretive rulings do not have the force and effect of regulations," and "they may not be used to overturn the plain language of the statute." *Schleier*, 515 U.S. at 336 n.8. Tellingly, the government does not even cite them in its brief.[33]

D. History Supports The Court Of Appeals' Interpretation

The novelty of petitioner's arguments highlights why its interpretation is incorrect. For more than 80

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[32] Petitioner (at 36-37) and the government (at 24-25) greatly overstate in arguing that Congress has ratified or somehow acquiesced in the IRS's interpretation that the statute still includes "pay for time lost." "What [they] refer[] to as 'Congress' deliberate acquiescence' should more appropriately be called Congress's failure to express any opinion." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality); *see also Rowan*, 452 U.S. at 258-62 (rejecting government's argument that Congress endorsed Treasury regulations where those regulations were "far from consistent" over time).

[33] Petitioner also cites (at 37) the Board's positions, but the Treasury Secretary, not the Board, is charged with administering the RRTA. 26 U.S.C. § 7805. So no deference is due to the Board. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018).

years, FELA and the RRTA have coexisted, yet no one – not petitioner, not the government, and not the AAR whose members employ 95% of all railroad employees – points to any instance in which the IRS has imposed RRTA taxes on satisfaction of a FELA judgment. The railroads have only recently raised this issue in litigation beginning in 2012.[34] The government has piggy-backed on these cases to advance its self-serving position that satisfaction of FELA judgments are taxable under the RRTA.

The government's position is inconsistent with the RRTA's plain text. It also conflicts with the settled treatment of § 104(a)(2) in the parallel FICA context. Although the government disavows those authorities, it provides no persuasive reason to do so. Affirming the Eighth Circuit ensures consistent outcomes across the RRTA and FICA and thus confirms that the statutory scheme operates to effectuate Congress's goal "to promote simplicity and ease of administration" in the tax code. *Rowan*, 452 U.S. at 257. The government's position on the precise question, advanced for the first time in recent litigation and contrary to many years of practical experience, therefore has no "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140

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[34] *See, e.g., Nielsen v. BNSF Ry. Co.*, No. 0807-10580, 2012 WL 12526344 (Or. Cir. Ct., Multnomah Cty., Mar. 5, 2012); *see also* JA27a (Declaration of Michael P. McReynolds in Support of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Collateral Source Offsets) ("I have been practicing law since 1977 in the FELA field, including my first 10 years working for Union Pacific Railroad and [petitioner]. In the hundreds of cases I have been involved with, [petitioner] and other railroads agreed that FELA verdicts and settlements, were not taxable under the Internal Revenue regulations and the [RRTA]. Only in the past few years has any suggestion been made that Railroad Retirement taxes should be deducted from FELA judgments.").

(1944); *see also Alaska v. Federal Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) ("We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation because 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM

TABLE OF CONTENTS

Page

Internal Revenue Code (26 U.S.C.):

26 U.S.C. § 104(a) ..... Add. 1

Federal Insurance Contributions Act, 26 U.S.C. § 3101 *et seq.*:

26 U.S.C. § 3101 ..... Add. 3

26 U.S.C. § 3111 ..... Add. 4

26 U.S.C. § 3121(a) ..... Add. 7

26 U.S.C. § 3121(b) (excerpt) ..... Add. 15

Railroad Retirement Tax Act, 26 U.S.C. § 3201 *et seq.*:

26 U.S.C. § 3201 ..... Add. 16

26 U.S.C. § 3221 ..... Add. 17

26 U.S.C. § 3231(b) ..... Add. 17

26 U.S.C. § 3231(d) ..... Add. 18

26 U.S.C. § 3231(e) ..... Add. 20

26 U.S.C. § 3241 ..... Add. 26

Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*:

45 U.S.C. § 231(f) ..... Add. 28

45 U.S.C. § 231(h) ..... Add. 29

1. Section 104(a) of the Internal Revenue Code, 26 U.S.C. § 104(a), provides:

§ 104. Compensation for injuries or sickness

(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

(3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980;

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)); and

(6) amounts received pursuant to—

(A) section 1201 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796); or

(B) a program established under the laws of any State which provides monetary compensation for surviving dependents of a public safety officer who has died as the direct and proximate result of a personal injury sustained in the line of duty,

except that subparagraph (B) shall not apply to any amounts that would have been payable if death of the public safety officer had occurred other than as the direct and proximate result of a personal injury sustained in the line of duty.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.

2. Relevant provisions of the Federal Insurance Contributions Act, 26 U.S.C. § 3101 *et seq.*, provide as follows:

§ 3101. Rate of tax

(a) Old-age, survivors, and disability insurance. —In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to 6.2 percent of the wages (as defined in section 3121(a)) received by the individual with respect to employment (as defined in section 3121(b)).

(b) Hospital insurance.—

(1) In general.—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to 1.45 percent of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)).

(2) Additional tax.—In addition to the tax imposed by paragraph (1) and the preceding subsection, there is hereby imposed on every taxpayer (other than a corporation, estate, or trust) a tax equal to 0.9 percent of wages which are received with respect to employment (as defined in section 3121(b)) during any taxable year beginning after December 31, 2012, and which are in excess of—

(A) in the case of a joint return, $250,000,

(B) in the case of a married taxpayer (as defined in section 7703) filing a separate return, ½ of the dollar amount determined under subparagraph (A), and

(C) in any other case, $200,000.

(c) Relief from taxes in cases covered by certain international agreements.—During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement exclusively to the laws applicable to the social security system of such foreign country.

§ 3111. Rate of tax

(a) Old-age, survivors, and disability insurance.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 6.2 percent of the wages (as defined in section 3121(a)) paid by the employer with respect to employment (as defined in section 3121(b)).

(b) Hospital insurance.—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 1.45 percent of the wages (as defined in section 3121(a)) paid by the employer with respect to employment (as defined in section 3121(b)).

(c) Relief from taxes in cases covered by certain international agreements.—During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement exclusively to the laws

applicable to the social security system of such foreign country.

[**(d)** Repealed. Pub. L. 115-141, div. U, title IV, § 401(b)(34), Mar. 23, 2018, 132 Stat. 1204]

(e) Credit for employment of qualified veterans.—

(1) In general.—If a qualified tax-exempt organization hires a qualified veteran with respect to whom a credit would be allowable under section 38 by reason of section 51 if the organization were not a qualified tax-exempt organization, then there shall be allowed as a credit against the tax imposed by subsection (a) on wages paid with respect to employment of all employees of the organization during the applicable period an amount equal to the credit determined under section 51 (after application of the modifications under paragraph (3)) with respect to wages paid to such qualified veteran during such period.

(2) Overall limitation.—The aggregate amount allowed as a credit under this subsection for all qualified veterans for any period with respect to which tax is imposed under subsection (a) shall not exceed the amount of the tax imposed by subsection (a) on wages paid with respect to employment of all employees of the organization during such period.

(3) Modifications.—For purposes of paragraph (1), section 51 shall be applied—

(A) by substituting "26 percent" for "40 percent" in subsection (a) thereof,

(B) by substituting "16.25 percent" for "25 percent" in subsection (i)(3)(A) thereof, and

(C) by only taking into account wages paid to a qualified veteran for services in furtherance of the activities related to the purpose or function constituting the basis of the organization's exemption under section 501.

(4) Applicable period.—The term "applicable period" means, with respect to any qualified veteran, the 1-year period beginning with the day such qualified veteran begins work for the organization.

(5) Definitions.—For purposes of this subsection—

(A) the term "qualified tax-exempt organization" means an employer that is an organization described in section 501(c) and exempt from taxation under section 501(a), and

(B) the term "qualified veteran" has the meaning given such term by section 51(d)(3).

(f) Credit for research expenditures of qualified small businesses.—

(1) In general.—In the case of a taxpayer who has made an election under section 41(h) for a taxable year, there shall be allowed as a credit against the tax imposed by subsection (a) for the first calendar quarter which begins after the date on which the taxpayer files the return specified in section 41(h)(4)(A)(ii) an amount equal to the payroll tax credit portion determined under section 41(h)(2).

(2) Limitation.—The credit allowed by paragraph (1) shall not exceed the tax imposed by subsection (a) for any calendar quarter on the wages paid with respect to the employment of all individuals in the employ of the employer.

(3) Carryover of unused credit.—If the amount of the credit under paragraph (1) exceeds the limitation of paragraph (2) for any calendar quarter, such excess shall be carried to the succeeding calendar quarter and allowed as a credit under paragraph (1) for such quarter.

(4) Deduction allowed for credited amounts.—The credit allowed under paragraph (1) shall not be taken into account for purposes of determining the amount of any deduction allowed under chapter 1 for taxes imposed under subsection (a).

§ 3121. Definitions

(a) Wages.—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a

trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[(3) Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason

of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500,

except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[**(9)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year

by the organization to the employee for such service is less than $100;

[(17) Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment.—For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section

233 of the Social Security Act; except that such term shall not include—

* * * * *

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

* * * * *

3. Relevant provisions of the Railroad Retirement Tax Act, 26 U.S.C. § 3201 *et seq.*, provide as follows:

§ 3201. Rate of tax

(a) Tier 1 tax.—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3101 for the calendar year.

(b) Tier 2 tax.—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.

(c) Cross reference.—

For application of different contribution bases with respect to the taxes imposed by subsections (a) and (b), see section 3231(e)(2).

§ 3221. Rate of tax

(a) Tier 1 tax.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the applicable percentage of compensation paid during any calendar year by such employer for services rendered to such employer. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3111 for the calendar year.

(b) Tier 2 tax.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the percentage determined under section 3241 for any calendar year of the compensation paid during such calendar year by such employer for services rendered to such employer.

(c) Cross Reference.—

For application of different contribution bases with respect to the taxes imposed by subsections (a) and (b), see section 3231(e)(2).

[**(d)** Redesignated (c)]

§ 3231. Definitions

* * * * *

(b) Employee.—For purposes of this chapter, the term "employee" means any individual in the service of one or more employers for compensation. The term "employee" includes an officer of an employer. The term "employee" shall not include any individual while such individual is engaged in the physical operations

consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

* * * * *

(d) Service.—For purposes of this chapter, an individual is in the service of an employer whether his service is rendered within or without the United States, if—

(1) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and

(2) he renders such service for compensation;

except that an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States, only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if—

(3) all, or substantially all, the individuals constituting its membership are employees of an employer conducting the principal part of its business in the United States; or

(4) the headquarters of such local lodge or division is located in the United States;

and an individual shall be deemed to be in the service of such a general committee only if—

(5) he is representing a local lodge or division described in paragraph (3) or (4) immediately above; or

(6) all, or substantially all, the individuals represented by it are employees of an employer conducting the principal part of its business in the United States; or

(7) he acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer, but in such case if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only such proportion of the remuneration for such service shall be regarded as compensation as the proportion which the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case such other formula as the Railroad Retirement Board may have prescribed pursuant to section 1(c) of the Railroad Retirement Act of 1937 (45 U.S.C. 228a) shall be applicable, and if the application of such mileage formula, or such other formula as the Board may prescribe, would result in the compensation of the individual being less than 10 percent of his remuneration for such service, no part of such remuneration shall be regarded as compensation;

Provided however, That an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof; and the laws applicable on August 29, 1935, in the place where the service is rendered shall be deemed to have been applicable there at all times prior to that date.

(e) Compensation.—For purposes of this chapter —

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary

expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q) as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall

be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases.—

(A) Compensation in excess of applicable base excluded.—

(i) In general.—The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded.—There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes.—Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base.—

(i) Tier 1 taxes.—Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.—For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers.—For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to

an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[(7) Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040]

(8) Treatment of certain deferred compensation and salary reduction arrangements.—

(A) Certain employer contributions treated as compensation.—Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation.—The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging.—The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions.—The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions.—The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options.—The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

* * * * *

§ 3241. Determination of tier 2 tax rate based on average account benefits ratio

(a) In general.—For purposes of sections 3201(b), 3211(b), and 3221(b), the applicable percentage for any calendar year is the percentage determined in accordance with the table in subsection (b).

(b) Tax rate schedule.—

"Average account benefits ratio		Applicable percentage for sections 3211(b) and 3221(b)	Applicable percentage for section 3201(b)
At least	But less than		
	2.5	22.1	4.9
2.5	3.0	18.1	4.9
3.0	3.5	16.1	4.9
3.5	4.0	14.1	4.9
4.0	6.1	13.1	4.9
6.1	6.5	12.6	4.4
6.5	7.0	12.1	3.9
7.0	7.5	11.6	3.4
7.5	8.0	11.1	2.9
8.0	8.5	10.1	1.9
8.5	9.0	9.1	0.9
9.0		8.2	0

(c) Definitions related to determination of rates of tax.—

(1) Average account benefits ratio.—For purposes of this section, the term "average account benefits ratio" means, with respect to any calendar year, the average determined by the Secretary of the account benefits ratios for the 10 most recent fiscal years ending before such calendar year. If the amount determined under the preceding sentence is not a multiple of 0.1, such amount shall be increased to the next highest multiple of 0.1.

(2) Account benefits ratio.—For purposes of this section, the term "account benefits ratio" means, with respect to any fiscal year, the amount determined by the Railroad Retirement Board by dividing the fair market value of the assets in the Railroad Retirement Account and of the National Railroad Retirement Investment Trust (and for years before 2002, the Social Security Equivalent Benefits Account) as of the close of such fiscal year by the total benefits and administrative expenses paid from the Railroad Retirement Account and the National Railroad Retirement Investment Trust during such fiscal year.

(d) Notice.—No later than December 1 of each calendar year, the Secretary shall publish a notice in the Federal Register of the rates of tax determined under this section which are applicable for the following calendar year.

4. Relevant provisions of the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*, provide as follows:

§ 231. Definitions

* * * * *

(f)(1) The term "years of service" shall mean the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost, and shall be computed in accordance with the provisions of section 231b(i) of this title. Twelve calendar months, consecutive or otherwise, in each of which an employee has rendered such service or received such wages for time lost, shall constitute a year of service. Ultimate fractions shall be taken at their actual value.

(2) Where service prior to August 29, 1935, may be included in the computation of years of service as provided in subdivision (3) of section 231b(i) of this title, it may be included as to—

(i) service rendered to a person which was an employer on August 29, 1935, irrespective of whether such person was an employer at the time such service was rendered;

(ii) service rendered to any express company, sleeping-car company, or carrier by railroad which was a predecessor of a company which, on August 29, 1935, was an employer as defined in paragraph (i) of subsection (a)(1), irrespective of whether such predecessor was an employer at the time such service was rendered; and

(iii) service rendered to a person not an employer in the performance of operations involving the use

of standard railroad equipment if such operations were performed by an employer on August 29, 1935.

* * * * *

(h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231h of this title, the period during which such compensation will have been earned.

(2) An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting

from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

(3) Solely for purposes of determining amounts to be included in the compensation of an employee, the term "compensation" shall also include cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4) Tips included as compensation by reason of the provisions of subdivision (3) shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) of the Internal Revenue Code of 1986 [26 U.S.C. 6053(a)] or, if no statement including such tips is so furnished, at the time received. Tips so deemed to be paid in any month shall be deemed paid for services rendered in such month.

(5) In determining compensation, there shall be attributable as compensation paid to an employee in calendar months in which he is in military service creditable under section 231b(i)(2) of this title, in addition to any other compensation paid to him with respect to such months—

(i) for each such calendar month prior to 1968, $160;

(ii) for each such calendar month after 1967 and prior to 1975, $260; and

(iii) for each such calendar month after 1974, the amount which is creditable as such individual's "wages" under section 209(d) of the Social Security Act [42 U.S.C. 409(d)].

(6) Notwithstanding the provisions of the preceding subdivisions of this subsection, the term "compensation" shall not include—

(i) tips, except as is provided under subdivision (3) of this subsection;

(ii) remuneration for service which is performed by a non-resident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 1101(a)(15) of title 8, as amended, and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be;

(iii) remuneration earned in the service of a local lodge or division of a railway-labor-organization employer with respect to any calendar month in which the amount of such remuneration is less than $25;

(iv) remuneration for service as a delegate to a national or international convention of a railway-labor-organization employer if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service;"

(v) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system

established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability; and

(vi) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment.

(7) The term "compensation" includes any separation allowance or subsistence allowance paid under any benefit schedule provided under section 701 of title VII of the Regional Rail Reorganization Act of 1973 [45 U.S.C. 797] and any termination allowance paid under section 702 of that Act [45 U.S.C. 797a], but does not include any other benefits payable under that title [45 U.S.C. 797 et seq.]. The total amount of any subsistence allowance paid under a benefit schedule provided pursuant to section 701 of the Regional Rail Reorganization Act of 1973 shall be considered as having been earned in the month in which the employee first timely filed a claim for such an allowance.

(8) Notwithstanding any other provision of this subchapter, for the purposes of sections 231b(a)(1),

231c(a)(1), and 231c(f)(1) of this title, the term "compensation" includes any payment from any source to an employee or employee representative if such payment is subject to tax under section 3201 or 3211 cf the Internal Revenue Code of 1986 [26 U.S.C. 3201, 3211].

* * * * *

No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

MICHAEL D. LOOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

Page

Table of Authorities ii

Reply 1

I. RRTA "Compensation" Encompasses Pay for Time Lost 2

A. Traditional Interpretive Tools Confirm that Pay for Time Lost is Taxable 2

1. Text 2

2. Structure 8

3. History and Purpose 12

B. The RRTA Does Not Distinguish Between Judgments and Settlements 16

C. The IRS's Interpretation Warrants *Chevron* Deference 18

II. Section 104(a)(2) Does Not Apply 19

Conclusion 25

TABLE OF AUTHORITIES

Cases Page(s)

Auer v. Robbins,
519 U.S. 452 (1997) 19

Barnhart v. Walton,
535 U.S. 212 (2002) 24

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 19

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 15

Envtl. Def. v. Duke Energy Corp.,
549 U.S. 561 (2007) 23

Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control,
857 F.3d 913 (D.C. Cir. 2017) 9

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 10

Hilton v. S.C. Pub. Railways Comm'n,
502 U.S. 197 (1991) 3

Kelley v. S. Pac. Co.,
419 U.S. 318 (1974) 3

Liberatore v. Monongahela Ry. Co.,
140 A.3d 16 (Pa. Super. Ct. 2016) 15

Lifetime Siding, Inc. v. United States,
359 F.2d 657 (2d Cir. 1966) 7

McNally v. United States,
483 U.S. 350 (1987) 10

Mead Corp. v. Tilley,
490 U.S. 714 (1989) 11

Montello Salt Co. v. Utah,
221 U.S. 452 (1911) 9

Cases—Continued Page(s)

Munoz v. Norfolk S. Ry. Co.,
2018 WL 2728696 (Ill. App. Ct. June 5, 2018) 15

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 24

Overstreet v. N. Shore Corp.,
318 U.S. 125 (1943) 11

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853 N.W.2d 636 (Iowa 2014) 10, 11, 12

Rowan Cos. v. United States,
452 U.S. 247 (1981) 23, 24

Schreiber v. Burlington N., Inc.,
472 U.S. 1 (1985) 10

Soc. Sec. Bd. v. Nierotko,
327 U.S. 358 (1946) 5, 12, 16

United States v. Cleveland Indians Baseball Co.,
532 U.S. 200 (2001) 5, 6, 10, 11

United States v. Mead Corp.,
533 U.S. 218 (2001) 24

United States v. Quality Stores, Inc.,
134 S. Ct. 1395 (2014) 4, 5, 6, 8

Universal Carloading & Distrib. Co. v. Pedrick,
184 F.2d 64 (2d Cir. 1950) 11

Statutes

26 U.S.C.
§ 61 20
§§ 101-140 22
§ 104 24
§ 104(a)(2) 19, 20, 22, 24
§ 108(f)(4) 22
§ 117 22
§ 125 22
§ 129 22

Statutes—Continued Page(s)

26 U.S.C. (cont.)
§ 137 22
§ 1500(a) (1946) 21
§ 3101 23
§ 3121(a) 24
§ 3121(b) 7
§ 3121(d)(2) 7
§ 3121(e)(1) 12
§ 3201 ..... 20, 21, 22, 23
§ 3201(a) 20
§ 3211 13
§ 3221 ..... 20, 21, 22
§ 3231(e) ..... *passim*
§ 3231(e)(1) 8, 24
§ 3231(e)(2) 19
§ 3231(e)(3) 22
§ 3231(e)(4) 8
§ 3231(e)(5) 22
§ 3402(a) 23
§ 6051(e)(1) 21
45 U.S.C.
§ 55 3
§ 231(a) 11
§ 231(b) 9
§ 231(f)(1) 10
§ 231(h) 9, 10
§ 231b(i)(2) 10
§ 231e(e)(2) 21
§ 231n(a) 12
§ 231n(b) 12
§ 362(*o*) 17
Act of July 31, 1946
Pub. L. 79-572 § 2, 60 Stat. 722 18

Statutes—Continued Page(s)

Carriers Taxing Act of 1937
§ 1(e), 50 Stat. 436 8

Executive Materials

26 C.F.R.
§ 31.3121(d)-1(c)(2) 7
§ 31.3231(e)-1(a)(1) 23
§ 31.3231(e)-1(a)(3) 18
§ 31.3231(e)-1(a)(4) 18
§ 410.5 (1938) 18

IRS Technical Advice Memorandum 8115012, 1980 WL 137627 (1980) 17, 19, 24

RRB, Pay for Time Lost from Regular Railroad Employment (2017) 17

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Legislative Materials

92 Cong. Rec. (July 26, 1946)
p. 10,132 11
p. 10,160 11

S. Rep. No. 75-818 (1937) 8

S. Rep. No. 79-1710 (1946) 5, 18

Other Authorities

Black's Law Dictionary 7

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REPLY

Respondent received a FELA award for "past *wage* loss." JA94a (emphasis added). It is called that for a reason: because the payment constitutes compensation for services rendered to BNSF, compensation to which respondent is entitled because of his employee-employer relationship with BNSF. Respondent tellingly does not defend the Eighth Circuit's holding that "services rendered" includes only pay for hours "actually" worked. Pet. App. 20a. Instead, respondent invents a special, this-case-only rule: compensation for "services rendered" *does* include compensation for hours *not* worked, but not if "negligence" is involved.

This is the first in a litany of arguments respondent throws up in the hopes that one will excuse him from paying employment taxes on his lost wages award. Respondent argues that a backpay award is not compensation for services rendered; but even if backpay is compensation, the RRTA taxes backpay only from settlements, not from judgments; but even if the RRTA taxes backpay judgments, only employers pay taxes, not employees. Each of these arguments runs headlong into the statutory text, this Court's precedents, 80 years of unbroken IRS guidance, and common sense. Employees receive credit for FELA backpay awards for purposes of the retirement annuity they earn on account of their service to the railroads, and respondent offers no conceivable reason why Congress would allow employees to reap the corollary retirement benefits without paying the corresponding taxes.

I. RRTA "Compensation" Encompasses Pay for Time Lost

A. Traditional Interpretive Tools Confirm that Pay for Time Lost is Taxable

1. Text

Payment for time lost falls squarely within the ordinary meaning of "remuneration" for "services rendered." 26 U.S.C. § 3231(e). Although the employee is not in *active* service, the employer nonetheless pays his salary because the employee *has* rendered services to the employer. The employer-employee relationship requires the employer to compensate the employee in periods of absence, the same as if he had showed up to work. Whether a payment reflects time lost due to injury compensable under FELA or worker's compensation statutes, or time lost to wrongful discharge under Title VII, the FLSA, or the ADA, or time lost to vacation, or time lost to disability, employees receive such payments only because of their employee status. Such payments are part and parcel of the entire employer-employee relationship; they are remuneration to the employee for entering into the relationship and providing services. BNSF paid respondent $30,000 for lost *wages*, not for lost profits or anything else.

Respondent does not defend the reasoning of the court below. The Eighth Circuit held that § 3231(e) does not "encompass the entire employee-employer relationship generally" and excludes lost wages from compensation because the statute "refers to services that an employee actually renders, not to services that the employee would have rendered but could not." Pet. App. 20a. Respondent, by contrast, believes that "compensation" *does* include payments

that are part of "an employee's package of compensation for rendering services" (Opp. 19) or that "enhance the employer-employee relationship" (Opp. 49). He thus concedes that pay for services rendered "can cover pay a railroad worker receives for time not actively working," including vacation, disability, sick pay, and worker's compensation. Opp. 19-20 & n.9, 24 n.12, 37.

These concessions give away the case. Payments for sickness, disability, and worker's compensation are materially indistinguishable from FELA backpay awards. AAR Br. 10-11. Indeed, states regard FELA and worker's compensation as *substitutes*, "specifically exclud[ing] railroad workers" from worker's compensation statutes because of FELA. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). Respondent argues that employees receive worker's compensation benefits for "services rendered" because worker's compensation statutes define "employee" to mean someone who "performs services." Opp. 20 n.9. But so does FELA. *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323-24 (1974). FELA protections, like vacation, disability, sick pay, and worker's compensation, are part of the benefits package that railroad employees receive from their employer. FELA requires railroads to provide employees a reasonably safe place to work and guarantees that employees who cannot work because of negligence receive their salary just the same. Confirming that FELA is part of the employment package, Congress prohibits employers from negotiating exceptions to FELA protections in employment contracts. 45 U.S.C. § 55.

Respondent argues that disability, sick pay, and worker's compensation are "compensation," while

FELA backpay is not, because payments for "negligence" or any "breach of legal duty" cannot constitute remuneration for services rendered. Opp. 14, 20-21, 37. But the distinction has no grounding in § 3231(e)'s *text*. The words "negligence" or "breach of legal duty" appear nowhere. Rather, as the term "services rendered" makes plain, the question for purposes of defining "compensation" is why the individual was entitled to the money, not why it was denied. Indeed, on respondent's theory, if an employer fails to send a paycheck, in "breach of its legal duty," and the employee sues for the wages, any damages would not be payment for "services rendered." Or if BNSF had paid respondent disability payments for the absence attributable to his injury, that might have been payment for services rendered, but if a jury ordered disability payments after finding a breach, it is not. None of this makes sense.

FELA payments for lost wages, like payments for severance, vacation, sick leave, or worker's compensation, "are made to employees only." *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1399 (2014). These payments are for services the employee would have, could have, and should have performed but for the employer's largesse or the employer's breach of duty. That is what matters.

For these reasons, this Court unanimously held—in two opinions that should be decisive here—that compensation for "service" to an employer encompasses severance pay and backpay owed for unlawful discharge, i.e., for breach of a legal duty. "Service" does not mean "only work actually done." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946); *see Quality Stores*, 134 S. Ct. at 1399-1400.

As Justice Frankfurter explained, "[t]he decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another, though he be inactive." *Nierotko*, 327 U.S. at 370-71 (concurrence). The RRTA uses language virtually identical to the statutes in these cases. Br. 18-20.

Indeed, all of the reasons why severance payments were taxable wages in *Quality Stores* equally support treating FELA backpay as taxable compensation here. *See* 134 S. Ct. at 1400-01. Respondent argues that severance payments "accrue with service time" and are "part of a package of benefits." Opp. 37. But so are backpay and other forms of pay for time lost—the amounts of which are determined by the employee's *salary*.

Respondent calls *Nierotko* "discredited," Opp. 34, but this Court relied on it four years ago in *Quality Stores*, offering additional reasoning "confirm[ing]" the *Nierotko* "principle." 134 S. Ct. at 1400-01. *Quality Stores* alone refutes respondent's effort (Opp. 37) to distinguish backpay and severance. And while *Nierotko* cited the statutory purpose, Opp. 35, its principal focus was the statutory "words." 327 U.S. at 365. Moreover, the statutory purpose here equally supports interpreting compensation to include pay for time lost. The RRTA's purpose is to fund RRA benefits, which indisputably include time lost. S. Rep. No. 79-1710, pt. 2, at 8 (1946) (expressing Congress's purpose to require "corresponding tax collection" for any payment credited as service).

United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001), does not "undermine" *Nierotko* (Opp. 35); if anything, it reasserted *Nierotko*'s holding that "backpay for a time in which the employee

was not on the job" nonetheless counts as pay for services, and thus wages. 532 U.S. at 210. *Cleveland Indians* then addressed *Nierotko*'s "secondary" holding crediting backpay for benefit purposes to the time earned. *Id.* at 211, 213-14. Deferring to the government's position, *Cleveland Indians* held that, for taxation purposes, backpay is allocable to the tax period when it was paid. *Id.* at 219-20. The Court noted the general rule of symmetrical construction for tax and benefits purpose—Congress generally sought "conformity ... between the tax and benefits provision"—but concluded that conformity was inessential with respect to the *timing* of the backpay. *Id.* at 215-16. Here, however, conformity is essential for funding the railroad pension system. AAR Br. 20-21; U.S. Br. 21. *Quality Stores* also post-dates *Cleveland Indians*, and *Quality Stores* reaffirmed and extended *Nierotko*'s benefits holding in interpreting the word "services" for taxation purposes, just four years ago. 134 S. Ct. at 1400.[1]

Respondent cites "linguistic differences between FICA and the RRTA." Opp. 38. None are material for these purposes. While the RRTA refers to "money remuneration," Opp. 38, respondent here undisputedly received money remuneration. Respondent notes that the RRTA defines "service" to require "continuing authority" by the employer, Opp. 38, but FICA requires that too. FICA taxes apply to remu-

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[1] Justice Scalia joined in *Quality Stores*' interpretation of "service ... performed," including its 2014 endorsement of *Nierotko*'s application of that phrase to include backpay. That should end any reliance on his earlier offhand statement in his *Cleveland Indians* concurrence about the ordinary meaning of "wages" (Opp. 21, 39).

neration for "service ... performed" by "employee[s]," 26 U.S.C. § 3121(b); employee status refers in turn to the "usual common law rules applicable in determining the employer-employee relationship," *id.* § 3121(d)(2); and those rules require a "right to control and direct," 26 C.F.R. § 31.3121(d)-1(c)(2). Respondent's statement that FICA "includes no similar 'focus on ... authority and control'" (Opp. 38) is thus incorrect. *E.g.*, *Lifetime Siding, Inc. v. United States*, 359 F.2d 657, 660 (2d Cir. 1966).

None of the dictionaries respondent cites (Opp. 17-19) remotely excludes backpay or other compensation for time lost from the terms "services rendered" or "compensation." On the contrary, the dictionaries reflect the broad reach of those terms. Respondent argues that dictionaries define "compensation" to include "loss, privation, *or* services rendered," signaling that "services rendered" cannot include "loss." Opp. 18-19 (emphasis added). Not so. Dictionaries use "or" to convey expansive meaning, not to signify that the connected words lack any overlap. Section 3231(e) defines taxable compensation to include losses so long as they are connected to "services rendered"—including respondent's "past lost wages" but excluding his medical bills, for example. JA94a.

Indeed, on respondent's theory, since *Black's Law Dictionary* defines compensation to include "remuneration or wages," Opp. 18, Congress's use of the term "remuneration" in § 3231(e) must have signaled its intent to exclude all "wages" from taxation. Obviously, it did not.

2. Structure

a. Congress's decision to separately exclude specific forms of pay for time lost from § 3231(e)(1)'s definition of "compensation" confirms that "compensation" reaches pay for time lost generally, including FELA backpay. Section 3231(e)(4) excludes certain kinds of sickness, disability, and worker's compensation payments from taxable "compensation." These exclusions would be utterly superfluous if § 3231(e)(1) already excluded all time lost from taxable compensation. Br. 21-22; U.S. Br. 13, 19-20; *see Quality Stores*, 572 U.S. at 1400 (interpreting FICA "wages" broadly in light of express exclusions). As explained, these types of payments are materially indistinguishable from FELA backpay awards. *Supra* p.3; *cf.* Opp. 19-20.

The 1937 bill confirms that Congress treated sickness and disability payments as a form of payment for time lost—and therefore that § 3231(e)(4) would be superfluous if § 3231(e)(1) excluded time lost. The Senate Report states that the 1937 bill "made clear" that sickness and disability payments constituted taxable compensation, S. Rep. No. 75-818, at 4 (1937)—an obvious reference to the phrase "including remuneration paid for time lost," which appeared in 1937 for the first time. 1937 RRTA § 1(e), 50 Stat. 436. And following enactment of the 1937 statute, the Treasury Department issued a regulation expressly linking all forms of time lost, including sick pay, vacation pay, and backpay for wrongful discharge. Treas. Reg. 100, Art. 6(b) (1937); U.S. Br. 23.

b. The RRTA's companion benefits statute, the RRA, further confirms that pay for time lost is taxa-

ble compensation. Br. 23-27; U.S. Br. 20-23. First, the RRA's use of the word "including" reflects Congress's understanding that "remuneration paid for time lost" is a form of "remuneration paid ... for services rendered." 45 U.S.C. § 231(h). Respondent argues that "including" can sometimes enlarge a phrase, rather than illustrate it. Opp. 24-27. But the very decision respondent cites holds that "enlargement" is the "exceptional sense" of "including," *not* the "ordinary sense," and rejects reading "including" to enlarge rather than illustrate. *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911); *see also Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control*, 857 F.3d 913, 921-22 (D.C. Cir. 2017) (illustration is "ordinary meaning" of including). In normal English, no one says, "I love vegetables, including peaches."[2]

Moreover, the phrase "including ... remuneration paid for time lost" must be illustrative rather than expansive because any other interpretation would render the RRA self-defeating. The RRA defines compensation to mean "remuneration ... for services rendered ..., including remuneration ... for time lost *as an employee*." 45 U.S.C. § 231(h) (emphasis added). An "employee" is an "individual in the *service* of one or more employers for compensation." *Id.* § 231(b) (emphasis added). "Service" has to have a consistent meaning in § 231. If respondent is right and pay for time lost is not pay for rendering service, it would be impossible to receive such payment "as

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[2] Respondent also cites statutes expanding a definition through variations of "The term X includes ...." Opp. 24-27 & nn.13-15. That is not the formulation here.

an employee" under § 231(h), and time lost payments would not be credited for RRA *benefit* purposes—contrary to Congress's manifest intent. Accordingly, pay for time lost must be pay for rendering service.

Respondent next argues that RRA provisions defining "years of service" refer to the years an employee "rendered service ... for compensation or received remuneration for time lost." Opp. 23 (citing 45 U.S.C. § 231(f)(1) and § 231b(i)(2)). But the "second phrase in [a] disjunctive" can be "added simply to make the meaning of the first phrase 'unmistakable.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994) (quoting *McNally v. United States*, 483 U.S. 350, 358-59 (1987)). Congress regularly uses "or" to describe overlapping or even basically identical concepts, for avoidance of doubt. *E.g.*, *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 7-8 (1985) (statute referring to conduct that is "fraudulent, deceptive, or manipulative" does not signal that manipulative conduct excludes fraudulent or deceptive conduct). As noted, the dictionaries respondent cites confirm this standard usage of "or." *Supra* p.7.

c. Stepping back, it is hard to conceive of a better case for symmetrical interpretation than a taxation statute exclusively intended to fund a benefits statute. U.S. Br. 20-21. Respondent offers no reason *why* Congress would treat time lost differently under the RRA and the RRTA, given that "the latter funds the former." *Phillips v. Chi. Cent. & Pac. R.R. Co.*, 853 N.W.2d 636, 649 (Iowa 2014); Br. 25. He asks this Court to ignore the *in pari materia* canon, relying on *Cleveland Indians*' decision (in deference to the government) to allocate backpay awards to different times for SSA and FICA purposes. Opp. 29-

30. But the Court expressly recognized that Congress wanted to ensure "conformity" between the "tax wage base" and the "benefits wage base"—which is the precise conformity at issue here. *Cleveland Indians*, 532 U.S. at 215-16.

Respondent denies that the *in pari materia* canon applies to statutes in different titles, but it does. *E.g.*, *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 126-32 (1943) (reading FLSA in Title 29 *in pari materia* with FELA in Title 45); *see, e.g.*, *Universal Carloading & Distrib. Co. v. Pedrick*, 184 F.2d 64, 65-66 (2d Cir. 1950) (RRTA and RRA are "cognate statutes" and "identical definition" "[o]bviously" should be "identically construed"). As for Congress's consideration in 1946 of a bill that made the RRTA's predecessor a "part of the RRA," Opp. 31, Congress jettisoned that change because it would have necessarily taken the tax collection function out of Treasury, not because Congress opposed conformity. 92 Cong. Rec. 10132, 10160 (July 26, 1946). In any event, unenacted legislation has little if any interpretive value. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). That principle also disposes of respondent's reliance on an unenacted 1992 bill. Opp. 31.

Contrary to respondent's suggestion (Opp. 18, 46), Congress added a provision crediting wartime military service toward benefit eligibility because the entity to whom such service is rendered (the United States) is not a *railroad* and thus would otherwise be excluded under the RRA's definition of "employer." 45 U.S.C. § 231(a). A special benefit for military employees hardly counsels against reading the RRTA and RRA symmetrically as a general matter. *See Phillips*, 853 N.W.2d at 649 (reading statutes sym-

metrically "absent controlling language to the contrary"). Moreover, Treasury reimburses the Railroad Retirement Board (RRB) for costs associated with accrued RRA benefits for military service. 45 U.S.C. § 231n(a), (b); Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 39 (1978). Congress's provision of alternative funding shows that Congress opposed the sort of unfunded RRA mandate respondent advocates here.

3. History and Purpose

a. The deletion in 1975 and 1983 of references to "time lost" in prior versions of 26 U.S.C. § 3121(e)(1) does not signal congressional intent to exempt time lost from RRTA taxation. *Cf.* Opp. 27-29. Rather, Congress amended the RRTA to conform timing rules for RRTA taxation to timing rules for RRA benefits, as the 1975 amendment's replacement of the word "earned" with "paid" makes plain. U.S. Br. 6 (showing strikeouts), 25-26; Br. 30-34, 7 n.12 & Add. 1a-20a. But Congress still needed to address a *second* reference to "earned"—the one associated with the phrase "including remuneration paid for time lost." U.S. Br. 6. Congress deleted the entire phrase rather than amending it because compensation for "services rendered" on its own readily encompasses compensation for time lost—as *Nierotko* held in 1946 when construing virtually identical language. *Supra* pp.4-5. The deletion eliminated clarifying (but ultimately unnecessary) language. Indeed, Congress simultaneously deleted a clarifying reference to "employee representative" in the same sentence, *see* U.S. Br. 6 (showing strikeouts), even though employee

representatives still receive taxable compensation, 26 U.S.C. § 3211.

Tellingly, respondent cannot settle on a date when he thinks Congress excluded payment for time lost from RRTA compensation. *Compare* Opp. 28 (1983) *with* Opp. 29 (1975). That is because the sequence of the amendments confirms Congress had no such intention. Congress could not have intended to exclude time lost in 1975, because Congress left four express references to "time lost," including for personal injury, in the second paragraph of the very provision it was amending, U.S. Br. 6-7, 28—another fact that respondent makes no effort to explain. Thus, for eight years (between 1975 and 1983) the statute contained instructions on what counted as pay for time lost and how to apportion payments that included time lost for personal injury, unambiguously showing that Congress believed "remuneration ... for services rendered" in the first sentence of 26 U.S.C. § 3231(e) continued to cover time lost for personal injury.

The 1983 amendment did not eliminate time lost from compensation either. The 1983 amendment made no changes to the first sentence of § 3231(e), and could not have altered the definition of "services rendered." Br. 28-29. Indeed, the 1983 amendment was expressly "technical" only, Br. 8, 32; U.S. Br. 9, 28-29, a point respondent ignores.

Respondent argues that the amendments had to have "real and substantial effect" (Opp. 27, 29), but altering timing rules is "real and substantial." And the legislative history confirms that the changes did not eliminate time lost from the meaning of compensation. Both the House and Senate sponsors ex-

plained in 1975 that Congress amended the "method" of assessing taxes, to make the tax and benefits computation "*consistent*." Br. 30-32 (emphasis added). Respondent makes no attempt to square the sponsor statements with his view that the 1975 amendment renders computation of tax and benefits compensation *inconsistent*. Nor does respondent address legislative history indicating that the 1975 amendment would cause only a $10,000 revenue loss, or dispute that that figure is irreconcilable with his interpretation. Br. 31-32.

Respondent's interpretation turns congressional intent on its head. Congress did not abruptly *end* a policy of consistent treatment of RRTA and RRA compensation that had persisted for nearly 40 years in an amendment aimed explicitly at *preserving* consistency. The secondary source on which respondent repeatedly relies (Opp. 2-3, 9) confirms that the amendment was intended solely to alter timing rules. Schreiber at 479.

Finally, after the 1975 amendment, Congress amended § 3231(e) to carve out *certain* specific types of payments for time lost. U.S. Br. 7-8, 14-15; *see supra* p.8. This statutory history strongly signals that the 1975 amendment had not already eliminated the entire "time lost" category.

b. Exempting pay for lost wages from taxable compensation would undermine Congress's goal of creating a self-sustaining retirement system for railroad employees. AAR Br. 20-21. And such an exemption would create an unjustified "windfall" for people like respondent, by "placing injured railroad employees in a better position than they would have been had they not been injured, as they receive the

same retirement benefits as noninjured employees but pay less for those benefits." *Munoz v. Norfolk S. Ry. Co.*, 2018 WL 2728696, at *9 (Ill. App. Ct. June 5, 2018) (dissent). Taxing the lost wages portion of a FELA award (or any other backpay award) restores employees to the position they would have been in absent injury and is therefore perfectly consistent with the "remedial" purposes of the RRA. Relatedly, respondent's invocation of a FELA remedial canon is misplaced. Opp. 40. This case involves the interpretation of the RRTA, not FELA, and respondent's interpretation would exclude all backpay awards from taxation, not just FELA awards. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

Respondent also argues that railroads support treating lost wages as taxable to provide a settlement advantage. His theory is that employees would rather settle for less and collusively categorize the entire sum as non-taxable, rather than risk a verdict where a jury allocation controls taxability. Opp. 40-41; AAJ Br. 30-36; SMART Br. 5-7. "This claim is specious." *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 31 (Pa. Super. Ct. 2016). The "risk" of paying taxes is a risk Congress *intended*; to the extent employees currently engage in sham settlement allocations—*e.g.*, $0 to lost wages—to avoid RRTA taxes, that is not a practice the Court should look to protect.

More generally, not only are the parties' motives irrelevant to the proper interpretation of the statute, there is nothing nefarious about the railroads joining the position the government has taken for 80 years. The government's interpretation provides a bright-line, administrable rule that treats as compensation

all payments made as part of the employer-employee relationship. Very little commends respondent's rule requiring a case-by-case assessment of payments under judgment vs. settlement, tort vs. contract, FELA vs. all other statutes, and so on—with every distinction depleting resources to fund RRA benefits. As for the jury instructions (Opp. 41), the law should drive jury instructions, rather than vice versa.

B. The RRTA Does Not Distinguish Between Judgments and Settlements

As a fallback, respondent argues that "pay for time lost" counts as RRTA "compensation" only if awarded pursuant to a settlement rather than a judgment. Opp. 9-10, 23, 32-34. Respondent cites no text supporting this distinction. The word settlement does not appear in the RRTA. To the contrary, compensation encompasses "*any form* of money remuneration." 26 U.S.C. § 3231(e) (emphasis added). A judgment for backpay is "[s]urely ... remuneration." *Nierotko*, 327 U.S. at 359, 364.

Respondent does not cite a single statute or decision—from any court, anywhere—distinguishing judgment-based awards and settlement-based awards for tax purposes, or any relevant purpose. And he identifies no justification for such a distinction. The fact that settling companies might not "admit liability" (Opp. 33) has no bearing on whether the settlement constitutes "money remuneration." Besides, settlements can be entered in the form of a judgment, and judgments can be subsequently altered through settlement.

As for the Railroad Unemployment Insurance Act's reference to judgments (Opp. 33), that is only because the RUIA *also* refers to settlements. 45

U.S.C. § 362(*o*). Since the RRTA does not refer to settlements but instead covers "any form of money remuneration," Congress had no need to refer specifically to judgments to ensure they were covered.

Respondent repeatedly asserts (Opp. 1, 6, 16, 54-55) that the IRS has never imposed RRTA taxes on FELA judgments. This assertion is not only irrelevant; it is false. In 1980, the IRS instructed an employer to withhold RRTA taxes from damages for lost wages pursuant to a FELA personal injury "jury award." IRS Technical Advice Memorandum 8115012, 1980 WL 137627 (1980). BNSF cited this document in its cert-stage reply (at 6). Moreover, a 1937 Treasury regulation interpreted RRTA "compensation" to include "back pay upon reinstatement after wrongful discharge," Reg. 100, Art. 6(b)—which presupposes a *judgment* finding the discharge wrongful. *See* Opp. 33 (settling parties do not "admit liability"). And the RRB has confirmed that RRTA compensation includes "judgment[s]." RRB, Pay for Time Lost from Regular Railroad Employment 9 (2017).

The Association of American Railroads (AAR) statement preceding the 1946 amendment does not support a settlement/judgment distinction. Opp. 9-10, 32. AAR referred to settlements not because payments in the form of judgments fail to qualify as compensation, but because settlements combining backpay with other items of damages, like pain and suffering, presented a distinct issue of apportionment. AAR Statement at 575-77. The Senate Report thus refers to "*general* settlement[s]" and "*lump-sum* settlement[s]." S. Rep. No. 79-1710 at 7-8 (emphasis added). In verdicts, however, juries can expressly

apportion damages between taxable lost wages and non-taxable pain and suffering or medical expenses—as the jury did here. JA94a. The 1946 amendment addressed the issue by creating a statutory presumption that unapportioned "payments" that included any time lost were taxable in their entirety. Pub. L. 79-572, § 2.

C. The IRS's Interpretation Warrants *Chevron* Deference

As explained above, traditional tools of statutory construction foreclose respondent's position. But, under *Chevron*, any ambiguity should be resolved in favor of the IRS's longstanding interpretation.

The IRS has defined "compensation" to include payments for time lost since the RRTA was enacted in 1937. *See* 26 C.F.R. § 410.5 (1938). A version of this regulation has remained in effect, without interruption, for 80 years. 26 C.F.R. §§ 31.3231(e)-1(a)(3), (4) (2018). The IRS has reiterated this interpretation in other formats as well. Br. 36-37; U.S. Br. 33-34.

Respondent thus moves the goalpost. He argues (Opp. 52, 53) that the current regulations do not address payments for "personal injuries" or "judgments." But the regulations provide that compensation includes "pay for time lost" without qualification—i.e., *any* time lost for *any* reason in *any* form. 26 C.F.R. §§ 31.3231(e)-1(a)(3), (4). The IRS need not specify that it means "time lost" payments pursuant to settlement, and pursuant to judgment, and pursuant to FELA personal-injury awards, and pursuant to Title VII unlawful-discharge awards, and so on. The decision below recognized that "[u]nder this regulation, [respondent's FELA] damages for lost wages fit well within the definition of 'compensa-

tion.'" Pet. App. 19a; *id.* 24a (describing the regulations as "contrary" to respondent's position). The United States agrees. U.S. Br. 33-34; *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *accord Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

The IRS's interpretation has not been inconsistent, as respondent claims (Opp. 53). Respondent points only to a 1979 regulatory amendment that deleted a 1960 provision concerning the apportionment of personal injury payments that contained both taxable components (e.g., backpay) and nontaxable components (e.g., medical expenses). *Id.* When announcing this change in 1979, the IRS explained that it made the amendment "to conform existing regulations ... to changes made" by a 1976 law. The change had nothing to do with the *1975* statutory amendment to § 3231(e) at issue here.

Indeed, respondent's interpretation of the 1979 regulatory revision conflicts with the contemporaneous statute, which retained references to "pay for time lost" and "personal injury" in § 3231(e)(2), as respondent acknowledges (Opp. 12). Not surprisingly, the IRS reaffirmed in 1980 its view that compensation still includes pay for time lost due to "personal injury." Technical Advice Memorandum, 1980 WL 137627. And again, that 1980 memorandum concerned a judgment, *supra* p.17, refuting respondent's suggestion that the IRS's interpretation deserves no deference because the agency never applied that interpretation to judgments.

II. Section 104(a)(2) Does Not Apply

Alternatively, respondent argues that, even if the RRTA itself defines compensation to include pay for time lost, another provision, 26 U.S.C. § 104(a)(2), ex-

cludes such pay from RRTA taxation. Opp. 42. Relying on the district court's holding, respondent argues that, because § 104(a)(2) excludes personal injury damages from "gross income," respondent's backpay award is likewise excluded from RRTA *employee* taxes that are "imposed on income." Opp. 42-44 (quoting § 3201(a)); Pet. App. 29a-30a. Respondent also maintains (Opp. 43, 48, 51) that, because the RRTA's *employer*-side tax in § 3221 is called an "excise tax" and not a "tax on income," § 104(a)(2) does not affect the employer-side tax. In other words, respondent's theory gerrymanders the RRTA to ensure that employees pay no tax; railroads pay the full tax; and employees receive full credit toward retirement benefits. This argument falters at every step.

1. Starting with the text, § 104(a)(2) does not limit the scope of "income." Instead, § 104(a)(2) limits the scope of "gross income." Gross income is defined as "all income ... [e]xcept as otherwise provided." 26 U.S.C. § 61. The RRTA, however, does not refer anywhere to "gross income"; rather, § 3201 says "income," which is a broader term than "gross income." FELA awards are indisputably "income" under the ordinary meaning of that term.

But it would not matter if RRTA used the term "gross income" (or § 104(a)(2) used the term "income"). The word "income" in § 3201 does not affect, much less limit, the calculation or amount of employee RRTA taxes owed. Rather, the word "income" clarifies only the *type* of tax and who pays it. Likewise, § 3221 calls the employer-side payment an "excise tax," denoting its source. Any other conclusion leads to absurd results. If the RRTA tax were based on "income" or "gross income," the RRTA tax base would sweep in *non-railroad* income, including everything

from dividends to lottery winnings. Employees would thus owe *more* RRTA taxes.

Although an employee pays RRTA tax out of income, the actual amount of RRTA tax due—for both employees and employers alike—is calculated based on employee "compensation." 26 U.S.C. §§ 3201, 3221; *id.* § 6051(e)(1) (RRTA is "tax on compensation"); 45 U.S.C. § 231e(e)(2) (same). Sections 3201 and 3221 identically describe the tax as "the applicable percentage of the compensation [received/paid] during any calendar year by such [employee/employer] for services rendered." 26 U.S.C. §§ 3201, 3221. In other words, *even if* "income" excluded payment for lost time (it does not), respondent's argument would only work if the Court read "compensation" to mean "compensation less exclusions from income" in § 3201, but to just mean "compensation" in § 3221. The RRTA defines "compensation" for all "purposes of this chapter," *id.* § 3231(e); the term cannot have different meanings for employers and employees.

2. Respondent's position would also render the RRTA incoherent for much of its existence. From 1946 to 1975, § 3231(e) defined "compensation" to include remuneration for "absence on account of personal injury." Br. 7 (quoting extant statute). At the same time, like today, the RRTA imposed "upon the *income* of every employee a tax equal to [a percentage] of the compensation." 26 U.S.C. § 1500(a) (1946) (emphasis added). On respondent's theory, however, these provisions contained irreconcilable mandates: "compensation" expressly *included* payment for time lost on account of personal injury, while the reference to "income" *excluded* it. That historical inconsistency is a strong reason to reject respondent's interpretation.

Respondent's position also cannot be right under the current law. The RRTA excludes from "compensation" many of the same income sources that 26 U.S.C. §§ 101-140 exclude from "gross income." *See* 26 U.S.C. § 3231(e). Section 104(a)(2) is notably absent from the RRTA's list, which is reason enough not to import it. Br. 41. And if the word "income" imports all gross income exclusions into the RRTA, then *all* exclusions from "compensation" in § 3231(e) are inexplicably superfluous. Respondent suggests (Opp. 48) that this massive superfluity only extends to employee taxes, since the word "income" does not appear for employers in § 3221. But had Congress wanted RRTA exclusions to apply only to one portion of RRTA taxes, Congress knew how to say so. *See* 26 U.S.C. § 3231(e)(3) (creating a rule "[s]olely for purposes of the taxes imposed by section 3201").

Respondent further argues (Opp. 49) that Congress included the express RRTA exclusions because they are "fringe benefits" that would otherwise constitute pay for "services rendered." But the RRTA also excludes from compensation various funds from *non*-employer sources, including certain "Qualified scholarships," 26 U.S.C. § 3231(e)(5) (referencing § 117), and federal and state student loan forgiveness, *id.* (referencing § 108(f)(4)). Conversely, Congress failed to exclude numerous fringe benefits that the tax code excludes from gross income. *E.g.*, *id.* §§ 125 (cafeteria plans), 129 (dependent care), 137 (adoption assistance). On respondent's theory, all of these items would nonetheless be inexplicably excluded from the employee's tax base, but not the employer's.

3. Respondent argues (Opp. 44-46) that because some lower courts have applied § 104(a)(2) to reduce FICA "wages," this Court should do the same to

RRTA "compensation." Besides the questionable logic of those decisions that "erroneously conflate distinct concepts of 'gross income' under the income-tax provisions and 'wages' under FICA," U.S. Br. 32, there is no textual basis to extend these decisions to the RRTA.

Respondent (Opp. 45) relies on *Rowan Cos. v. United States*, 452 U.S. 247, 254 (1981), which held that the term "wages" excludes meals and lodging for purposes of both (1) wages taxed by FICA under § 3101 and (2) wages withheld for federal income tax under § 3402(a). This case is fundamentally different. *Rowan*'s importation of exclusions from "wages" into a statute taxing "wages" does not support importing such exclusions into a statute taxing "compensation." Wages and compensation are not identical, as the statutory definitions and regulations make clear. 26 C.F.R. § 31.3231(e)-1(a)(1).

If anything, *Rowan* undercuts respondent's interpretation. *Rowan* concluded that Congress would not give the same term ("wages") different meanings in similar contexts. *Rowan* refutes respondent's theory that Congress gave different terms ("gross income" and "compensation") the *same* meaning. *Rowan* also turned on Congress's "interest [in] simplicity and ease of administration." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007). Reading "compensation" to mean one thing for purposes of RRTA employee-side taxes and another for purposes of employer-side taxes and RRA benefits renders the statutes more complex and less administrable.

Finally, Congress undid *Rowan* by statute, including by adding anti-*Rowan* language to the RRTA. 26 U.S.C. § 3231(e)(1) (providing that income-tax "exclusions from 'wages'" do not "require a similar exclu-

sion from 'compensation'"); *see id.* § 3121(a) (same for FICA). The Court should hardly *extend Rowan*.

4. Any doubt is resolved by the IRS's longstanding position that § 104(a)(2) does not limit the RRTA. Br. 43-44; Technical Advice Memorandum, 1980 WL 137627. Respondent states (Opp. 54) that the agency rulings "pertain to settlements, not FELA judgments," but he does not explain why that distinction makes one iota of difference on whether to import § 104 into the RRTA. *Supra* pp.16-18. Respondent also argues (Opp. 54) that revenue rulings "do not have the force and effect of regulations," but he does not dispute that the rulings evince the kind of longstanding agency interpretation to which this Court defers. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001); *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); Br. 43-45. There is no good reason to overturn the IRS's settled view on this issue either.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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BNSF RAILWAY COMPANY, PETITIONER

v.

MICHAEL D. LOOS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an employer's payment of back pay to an employee for working time lost due to an on-the-job injury is taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. 3231(e).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory and regulatory provisions involved 2
Statement 2
A. Statutory background 2
B. The enactment of the RRTA and RRA 3
C. Development of the RRTA 5
D. Current RRTA regulations 9
E. Proceedings in this case 10
Summary of argument 12
Argument:
Taxable "compensation" under the RRTA includes money remuneration paid as part of the employer-employee relationship, not simply payments for active service 16
A. RRTA "compensation" includes money remuneration paid as part of the employer-employee relationship 16
1. Under this Court's decisions, remuneration "paid to an employee for services rendered to one or more employers" includes remuneration for time not spent in active service 16
2. The statutory context confirms that the RRTA's definition of "compensation" extends beyond payments for active service and encompasses pay for time lost 19
3. The RRTA's history bolsters the most natural interpretation of the statutory text 23
4. The income-tax exclusion for "payments on account of personal physical injuries" does not apply to RRTA taxation 30
B. The Treasury Department's longstanding construction of RRTA "compensation" is reasonable and warrants deference 33

Table of Contents—Continued: Page

Conclusion 35
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alton R.R. v. *Railroad Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936) 3
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 628 F. Supp. 1431 (D. Kan. 1986) 6
Atlantic Land & Improvement Co. v. *United States*, 790 F.2d 853 (11th Cir. 1986) 21
Branch v. *Smith*, 538 U.S. 254 (2003) 20
CFTC v. *Schor*, 478 U.S. 833 (1986) 24
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 11, 15, 16
Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 22
Cottage Sav. Ass'n v. *Commissioner*, 499 U.S. 554 (1991) 24
Director of Revenue v. *CoBank ACB*, 531 U.S. 316 (2001) 29
Dotson v. *United States*, 87 F.3d 682 (5th Cir. 1996) 32
Erlenbaugh v. *United States*, 409 U.S. 239 (1972) 21
Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) 22
Gerbec v. *United States*, 164 F.3d 1015 (6th Cir. 1999) 32
Groman v. *Commissioner*, 302 U.S. 82 (1937) 22
Kellogg Brown & Root Servs., Inc. v. *Carter*, 135 S. Ct. 1970 (2015) 25

Cases—Continued: Page

Mayo Found. for Med. Educ. & Research v. *United States*, 562 U.S. 44 (2011) 15, 33
Puerto Rico v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016) 29
Redfield v. *Insurance Co. of N. Am.*, 940 F.2d 542 (9th Cir. 1991), overruled on other grounds by *Commissioner* v. *Schleier*, 515 U.S. 323 (1995) 32
Reiche v. *Smythe*, 80 U.S. (13 Wall.) 162 (1872) 22
Social Sec. Bd. v. *Nierotko*, 327 U.S. 358 (1946) 13, 16, 17, 18, 19, 23
Taylor v. *United States*, 495 U.S. 575 (1990) 25
Texas Dep't of Hous. & Cmty. Affairs v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015) 24
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 24
United States v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014) 13, 18, 19
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 22
United States v. *Stewart*, 311 U.S. 60 (1940) 21
Universal Carloading & Distrib. Co. v. *Pedrick*, 184 F.2d 64 (2d Cir.), cert. denied, 340 U.S. 905 (1950) 21
Wisconsin Central Ltd. v. *United States*, 138 S. Ct. 2067 (2018) 3, 13, 21

Statutes and regulations:

Act of Aug. 29, 1935, ch. 813, § 1(d), 49 Stat. 974 ..... 3, 23
Act of July 31, 1946, ch. 709, § 2, 60 Stat. 722 ..... 5, 26
Act of Aug. 9, 1975, Pub. L. No. 94-93, Tit. II, 89 Stat. 466, Tit. II:
§§ 201-207, 89 Stat. 466-467 6
§ 204, 89 Stat. 466 27

Statutes and regulations—Continued: Page

§§ 204-205, 89 Stat. 466 27
§§ 204-206, 89 Stat. 466 7
§ 206, 89 Stat. 466 27
Act of Oct. 18, 1976, Pub. L. No. 94-547, § 4(b), 90 Stat. 2526 8
Act of Dec. 29, 1981, Pub. L. No. 97-123, 95 Stat. 1659:
§ 3(b)(1), 95 Stat. 1662 8
§ 3(c), 95 Stat. 1662 8
Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435 4
§ 1(e), 50 Stat. 436 ..... 4, 14, 26
Federal Employers Liability Act (Railroads), 45 U.S.C. 51 *et seq.* 10
Federal Insurance Contributions Act, 26 U.S.C. 3101 *et seq.* 9
26 U.S.C. 3121(a) 19
26 U.S.C. 3121(b) 19
26 U.S.C. 3121(b)(9) 2
Internal Revenue Code of 1939, ch. 2, 53 Stat. 15 21
Internal Revenue Code (26 U.S.C.):
§ 1 30
§ 11 30
§ 61 30
§ 63 (2012 & Supp. IV 2016) 31
Subt. A., Ch. 1, Subch. B., Pt. III 31
§ 104 31
§ 104(a)(2) 15
§ 7805 3
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 17
Railroad Retirement Act of 1935, ch. 812, 49 Stat. 967 3

Statutes and regulations—Continued: Page

Railroad Retirement Act of 1937, ch. 382, 50 Stat. 307 4
§ 1(h), 50 Stat. 309 4
Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 1
45 U.S.C. 231a-c 2
45 U.S.C. 231(h)(1) 2, 14, 21, 34, 6a
45 U.S.C. 231(h)(2) 33
45 U.S.C. 231(*o*) 2
45 U.S.C. 231b 33
Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, 97 Stat. 411 8
§§ 211-226, 97 Stat. 419-426 29
§ 225, 97 Stat. 424 ..... 9, 28, 30
Railroad Retirement Tax Act, 26 U.S.C. 3201 *et seq.* 1
26 U.S.C. 3231(e)(1) (1970) 27
26 U.S.C. 3231(e)(1) (1970 & Supp. V 1975) 7
26 U.S.C. 3231(e)(1) (1976) 7
26 U.S.C. 3231(e)(1) ..... *passim*, 1a
26 U.S.C. 3231(e)(2) (1976) 28
26 U.S.C. 3231(e)(2) (1982) 9, 29
26 U.S.C. 3231(e)(2) 9, 29, 2a
26 U.S.C. 3231(e)(4)(A) 8, 5a
26 U.S.C. 3231(e)(4)(B) 8, 5a
26 U.S.C. 3231(e)(4)(C) 8, 5a
Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.* 20
Social Security Act, 42 U.S.C. 301 *et seq.* 13

Regulations—Continued: Page

20 C.F.R.:
Section 225.2-3 2
Section 226.60 2
26 C.F.R.:
Section 31.3231(e)-1(a)(1) 9, 7a
Section 31.3231(e)-1(a)(3) 10, 33, 7a
Section 31.3231(e)-1(a)(3)-(4) 3, 9, 11
Section 31.3231(e)-1(a)(4) 10, 33, 7a
U.S. Treasury Dep't, Bureau of Internal Revenue, *Regulations 100 Relating to Employers' Tax Employees' Tax, and Employee Representatives' Tax Under the Carriers Taxing Act of 1937* (1937):
Art. 5 ..... 3, 4, 14, 23
Art. 6(b) 5, 14, 23

Miscellaneous:

59 Fed. Reg. 66,149 (Dec. 23, 1994) 10
H.R. Rep. No. 30, 98th Cong., 1st Sess. Pt. 2 (1983) 9, 30
Internal Revenue Service:
Internal Revenue Manual (2004) 32
Technical Advice Memorandum 115068-09 (2010) 32
Supp. S. Rep. No. 1710, 79th Cong., 2d Sess. Pt. 2 (1946) 5
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Rev. Rul. 75-266, 1975-2 C.B. 408 ..... 6, 26

In the Supreme Court of the United States

No. 17-1042

BNSF RAILWAY COMPANY, PETITIONER

v.

MICHAEL D. LOOS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented is whether an employer's payment of back pay to an employee for time during which the employee was unable to work due to an on-the-job injury constitutes taxable "compensation" under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3201 *et seq.* Because taxes collected under the RRTA fund the retirement benefits paid to railroad workers under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. 231 *et seq.*, the United States has a substantial interest in the resolution of this question. The Treasury Department has issued a regulation that addresses the question presented, and the United States filed a brief supporting petitioner in the court of appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes and regulations are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

A. Statutory Background

Two federal statutes operate together to provide retirement benefits for workers in the railroad industry. They substitute for Social Security, from which railroad workers are exempt, and provide additional benefits comparable to those of a private pension plan. See 26 U.S.C. 3121(b)(9).

First, to fund the retirement benefits, the RRTA imposes a tax on railroad workers' "compensation." The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1).

Second, the RRA governs the payment of benefits to railroad retirees. As in the Social Security system, the amount of benefits that a particular retiree receives depends in part on the amount and allocation of the retiree's past "compensation." See 20 C.F.R. 225.2-.3, 226.60; see also 45 U.S.C. 231a-c; 45 U.S.C. 231(*o*). The RRA defines "compensation" as:

> any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.

45 U.S.C. 231(h)(1).

The Treasury Department, which is charged with prescribing rules and regulations to implement the RRTA, 26 U.S.C. 7805, has construed the RRTA's definition of taxable "compensation" as "not confined to amounts paid for active service," and instead as encompassing "amounts paid for an identifiable period during which the employee is absent from the active service of the employer," including "pay for time lost." 26 C.F.R. 31.3231(e)-1(a)(3)-(4); see Reg. 100, Art. 5 (1937) (substantially identical construction, adopted in the year of the statute's enactment).

B. The Enactment Of The RRTA And RRA

Congress began work on a federal railroad retirement system in the early 1930s, when private pension plans in the railroad industry spiraled into "a state of crisis." Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008). Because the Social Security system was expected to operate only prospectively and would not begin paying benefits for several years, Congress created a separate railroad retirement system, supported by a tax on railroad workers' pay. See *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067 (2018).

A 1935 statute taxing railroad workers' compensation to fund retirement benefits limited taxable "compensation" to "any form of money remuneration *for active service*, received by an employee from a carrier." Act of Aug. 29, 1935 (1935 Act), ch. 813, § 1(d), 49 Stat. 974 (emphasis added). The companion benefits statute also calculated benefits based on "active" service. See Railroad Retirement Act of 1935, ch. 812, 49 Stat. 967. But the 1935 version of the RRTA was invalidated by a federal court. See *Alton R.R.* v. *Railroad Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

Congress then enacted a revised package of railroad-pension legislation that forms the basis for today's railroad retirement system. As amended and renamed, the Carriers Taxing Act of 1937 (1937 RRTA), ch. 405, 50 Stat. 435, is today's RRTA, and an accompanying benefits statute, the Railroad Retirement Act of 1937, ch. 382, 50 Stat. 307, is the precursor to today's RRA.

The 1937 RRTA rendered an employee's compensation taxable when that compensation was *earned*, rather than when it was *paid*. § 1(e), 50 Stat. 436. Both the RRTA and RRA defined "compensation" identically—and without the 1935 statutes' limitation to "active" service—as

> any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.

Ibid.; RRA § 1(h), 50 Stat. 309.

In regulations issued shortly after the RRTA's enactment, the Treasury Department construed the RRTA's definition of "compensation" as reaching remuneration both for periods of active service and for periods in which the employee was not actually performing work for the employer. The regulations provided that compensation is "not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee or employee representative is absent from active service." Reg. 100, Art. 5 (1937). As examples of the second type of com-

pensation, the rules referred to "[s]ick pay, vacation allowances, or back pay upon reinstatement after wrongful discharge." *Id.* Art. 6(b).

C. Development Of The RRTA

Congress has revised the RRTA provision defining compensation more than 40 times since the statute's enactment, including to shift from an as-earned to an as-paid taxation model and to carve out particular forms of compensation.

1946 Amendments. The RRTA provisions treating employees' compensation as taxable when *earned*, regardless of when the compensation was *paid*, imposed "heavy administrative burdens both on the [Railroad Retirement] Board and on the employers to make thousands of corrections in reports previously filed." Supp. S. Rep. No. 1710, 79th Cong., 2d Sess. Pt. 2, at 7 (1946). Congress therefore replaced language requiring each railroad employee to pay taxes on "compensation * * * earned by" the employee with language requiring the employee to pay taxes on compensation "paid to" the employee. Act of July 31, 1946 (1946 Act), ch. 709, § 2, 60 Stat. 722.

Congress also amended the RRTA and RRA definitions of "compensation" by adding a second paragraph, which established a "presum[ption]" that compensation was earned in the period in which it was paid. 1946 Act § 2, 60 Stat. 722. The paragraph also provided additional guidance concerning when employers' payments should be deemed to be for "time lost," by specifying that "[a]n employee shall be deemed to be paid, 'for time lost' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury." *Ibid.*

1975 Revenue Ruling and Statutory Amendments. The 1946 amendments left in place some statutory references to when payments were "earned." Even after those amendments were enacted, the IRS continued to take the position that certain back payments should be taxed at the rate that applied when the payments were earned, and the agency expressed that view in a 1975 Revenue Ruling. See Rev. Rul. 75-266, 1975-2 C.B. 408; see also *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 628 F. Supp. 1431, 1435 (D. Kan. 1986) (stating that, "[a]fter the 1946 amendments, it was unclear whether compensation was to be taxed on an 'as earned' or an 'as paid' basis," and noting the railroad's contention "that the IRS routinely taxed on an 'as earned' basis").

Several months after the 1975 revenue ruling, Congress amended the statute again to eliminate provisions that appeared to make relevant when payments were "earned." Act of Aug. 9, 1975 (1975 Act), Tit. II, §§ 201-207, 89 Stat. 466-467. Those provisions included the portion of the RRTA's definition of "compensation" that addressed pay for time lost. Congress modified the definition as shown below, with the new language shown in boldface, the eliminated language stricken through, and the language in roman type left unchanged:

> (e) COMPENSATION.—
>
> For purposes of this chapter-
>
> (1) The term 'compensation' means any form of money remuneration ~~**earned by**~~ **paid to** an individual for services rendered as an employee to one or more employers, ~~**or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.**~~

> (2) **An employee shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and a showing that such compensation was earned during a period other than the period in which it was paid.** ~~**A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made.**~~ An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

See §§ 204-206, 89 Stat. 466; 26 U.S.C. 3231(e) (1970 & Supp. V 1975).

1977 Exemption For A Particular Class of Time Not Spent In Active Service. The next year, Congress amended the RRTA's definition of "compensation" (26 U.S.C. 3231(e)(1) (1976)) to carve out certain sickness and disability payments—a particular category of

payments for time not spent in active service to the employer. Act of Oct. 18, 1976, § 4(b), 90 Stat. 2526. The 1977 law provided that "compensation" under the RRTA "does not include (i) the amount of any payment * * * made to or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally * * * on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability." *Ibid.*

1981 Narrowing of the Sickness and Disability Exception. Congress pared back that exemption four years later. First, it directed that the only payments under a sickness or disability plan that should be categorically excluded from the RRTA's definition of taxable "compensation" were "payments which are received under a worker's compensation law" and RRA benefits. Act of Dec. 29, 1981 (1981 Act), § 3(b)(1), 95 Stat. 1662; see 26 U.S.C. 3231(e)(4)(A). Second, it specified that certain other payments under sickness and disability plans would be excludable only after the employee had been separated from the employer for six months. 1981 Act § 3(c), 95 Stat. 1662; see 26 U.S.C. 3231(e)(4)(C). Third, it provided that an employer's payments "for days of sickness" under the Railroad Unemployment Insurance Act would also be excludable only after the employee had been separated for six months, unless those payments were "the result of on-the-job injury." 1981 Act § 3(c), 95 Stat. 1662; see 26 U.S.C. 3231(e)(4)(B) and (C).

1983 Technical Amendments. The Railroad Retirement Solvency Act of 1983 (1983 Act), 97 Stat. 411, made "[t]echnical" changes to the definition of "compensation"—including changes that eliminated discussion of

when payments were "deemed" to be for "time lost." See 26 U.S.C. 3231(e)(2) (1982). The 1983 Act principally increased tax rates and annualized the wage base, in order to improve the railroad retirement system's solvency. In its final section, entitled "[t]echnical [a]mendments," 1983 Act § 225, 97 Stat. 424, the statute struck the existing Subsection (e)(2)—which had addressed when an employee would be "deemed to be paid compensation," and when an employee was "deemed to be paid 'for time lost,'" 26 U.S.C. 3231(e)(2) (1982)—and inserted in its place rules pertaining to the annual wage base. 1983 Act § 225, 97 Stat. 424; see 26 U.S.C. 3231(e)(2). The House Report described the change as implementing "technical and conforming amendments * * * in light of the fact that the current monthly wage bases for railroad retirement taxes [we]re changed to annual amounts" under other provisions of the bill. H.R. Rep. No. 30, 98th Cong., 1st Sess. Pt. 2, at 29 (1983) (1983 House Report).

D. Current RRTA Regulations

Treasury Department regulations continue to provide that RRTA "*compensation*" includes an employer's remuneration of an employee for time not spent in active service, including payments for "time lost." 26 C.F.R. 31.3231(e)-1(a)(3)-(4). They state at the outset that taxable "*compensation*" under the RRTA typically carries the same meaning as taxable "*wages*" under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* "except as specifically limited by the Railroad Retirement Tax Act * * * or regulation." 26 C.F.R. 31.3231(e)-1(a)(1). They further provide that "[t]he term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent

from the active service of the employer." 26 C.F.R. 31.3231(e)-1(a)(3). The regulations specify that "[c]ompensation includes * * * pay for time lost." 26 C.F.R. 31.3231(e)-1(a)(4).

When the Treasury Department revised its regulations concerning RRTA "compensation" in 1993, the Department utilized notice-and-comment rulemaking and rejected a commenter's suggestion that, because amendments to the RRTA had removed express references to "time lost," such payments had become nontaxable under the statute. 59 Fed. Reg. 66,149, 66,188-66,201 (Dec. 23, 1994). The agency concluded that although Congress had removed the prior discussion of "time lost" in the course of changing the RRTA's taxation structure "to a 'paid basis' from an 'earned basis,'" payment for time lost was still taxable compensation. *Id.* at 66,188.

E. Proceedings In This Case

1. Respondent, who worked for petitioner as a conductor, brakeman, and switchman, missed numerous days of work after he "twisted his knee when he fell into a snow-covered drainage grate in the train yard." Pet. App. 4a; see *id.* at 3a-6a.

Respondent filed suit, alleging (as relevant here) that petitioner was liable under the Federal Employers Liability Act (Railroads), 45 U.S.C. 51 *et seq.*, for negligently causing the knee injury. Pet. App. 7a. A jury agreed that petitioner had been negligent and awarded respondent damages, including $30,000 for lost wages for the periods when respondent had been unable to work for petitioner. *Ibid.* Petitioner concluded that its payment of lost wages to respondent constituted taxable compensation under the RRTA, and that it was

therefore required to withhold a portion of the lost-wages award for RRTA taxes. *Ibid.*

2. The district court held that such withholding was improper, concluding that payments for "time lost" were not taxable under the RRTA. Pet. App. 29a-30a. The court did not dispute that payments for time lost fell within the RRTA's definition of taxable "compensation." It concluded, however, that those payments were excluded from RRTA taxation because the Internal Revenue Code excludes from income tax "the amount of any damages (other than punitive damages) received * * * on account of physical injuries." *Id.* at 30a (citation omitted).

3. The court of appeals affirmed on a different rationale. Pet. App. 1a-24a. It acknowledged that the Treasury Department's interpretations of the RRTA are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that "damages for lost wages fit well within the definition of 'compensation'" adopted by the agency. Pet. App. 19a. The court concluded, however, that the Treasury Department had acted unreasonably in construing the statute to reach "amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . . as well as pay for time lost." *Ibid.* (quoting 26 C.F.R. 31.3231(e)-1(a)(3)-(4)).

The court of appeals acknowledged that, under FICA—the statute that funds Social Security retirement benefits for non-railroad employees—payments for periods in which an employee is not performing active service can constitute taxable wages. Pet. App. 19a-20a. The court found this Court's FICA precedents inapposite, however, on the ground that FICA taxes

payments for "employment" rather than payments for "services." *Id.* at 20a. The court concluded that a payment for lost wages cannot constitute remuneration "'for services rendered'" because such a payment is for "a period of time during which the employee did not actually render any services." *Ibid.*

The court of appeals declined to interpret the RRTA's definition of "compensation" *in pari materia* with the definition of "compensation" contained in the RRA. Pet. App. 21a. It acknowledged that the two statutes "accomplish a unified purpose: the RRA provides benefits, while the RRTA funds them." *Ibid.* It concluded, however, that the *in pari materia* canon is inapplicable here because the RRA's definition of compensation expressly includes "pay for time lost," while the RRTA's does not. *Ibid.* The court viewed the statutory history as "confirm[ing]" this analysis because the RRTA previously included express references to payment for time lost, but those references had been removed. *Id.* at 21a-23a. Finding the RRTA "unambiguous" in excluding payments for lost wages from taxable "compensation," the court affirmed the district court's judgment. *Id.* at 24a.

SUMMARY OF ARGUMENT

A. Under the plain meaning of the RRTA, money remuneration that an employer pays to an employee as part of the employer-employee relationship constitutes taxable "compensation," even when it covers periods in which the employee was not in active service.

1. Payments of money remuneration as part of the employer-employee relationship are payments "for services rendered as an employee to one or more employers," 26 U.S.C. 3231(e)(1), even when they cover periods in which the employee is not in active service. This

Court has adopted that approach in construing materially identical language in the Social Security Act, 42 U.S.C. 301 *et seq.*, and FICA.

In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), the Court held that the Social Security Act's definition of "wages" as remuneration for "any service . . . performed . . . by an employee for his employer" reached not only payments for "work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Id.* at 365-366. In *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014), the Court adopted the same construction of the same language in FICA. The RRTA's substantially similar definition of "compensation" should likewise be construed to encompass money remuneration arising from "the entire employer-employee relationship," including payments for time lost due to workplace injury, not simply payments for "work actually done." *Nierotko*, 327 U.S. at 366.

2. Surrounding statutory provisions confirm this understanding of the RRTA's definition of "compensation." Exceptions to that definition for limited types of payment "on account of sickness or accident disability," 26 U.S.C. 3231(e)(1) and (4), reflect the understanding that "compensation" ordinarily extends beyond payments for hours spent in active service. If the RRTA's definition of "compensation" reached only payments for periods of active service, no carve-out would be needed to exclude classes of sickness and disability pay.

The RRA further supports petitioner's view that RRTA "compensation" includes payments for time lost due to on-the-job injury. The RRA is the RRTA's "companion statute," *Wisconsin Central Ltd.* v. *United*

States, 138 S. Ct. 2067, 2073 (2018), and governs the calculation of benefits funded through RRTA taxes. The RRA defines compensation as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, *including remuneration paid for time lost as an employee.*" 45 U.S.C. 231(h)(1) (emphasis added). The italicized language indicates that, for purposes of the RRA, Congress viewed "remuneration paid for time lost" as a "form of money remuneration paid to an individual for services rendered." Particularly given the close relationship between the two statutes, the RRTA's identical basic definition of "compensation" should be construed to reflect the same understanding.

3. In the year that the RRTA was enacted, the Treasury Department construed the term "compensation" to encompass "amounts earned or paid for periods during which the employee or employee representative is absent from active service," including "[s]ick pay, vacation allowances, or back pay upon restatement." Reg. 100, Art. 5 and 6(b) (1937). Congress has not overridden that agency construction, and the narrow exclusions from taxable "compensation" that Congress has enacted would be superfluous under the court of appeals' understanding of that term.

The court of appeals' interpretation was based in part on mistaken inferences from the statutory history. As originally enacted, the RRTA stated that its general definition of compensation "includ[es] remuneration paid for time lost as an employee," before setting out a special timing rule for identifying when such "time lost" payments should be "deemed earned." 1937 RRTA § 1(e), 50 Stat. 436. Although Congress in 1975 deleted

the discussion of "time lost" in the definition of "compensation," it did so in the course of shifting RRTA taxation from an as-earned to an as-paid basis, and it left in place other references to "time lost" in the next subsection of the statute. Neither that 1975 amendment, nor the deletion in 1983 of the RRTA's remaining references to time lost—as part of what Congress described as technical amendments—can appropriately be read to create a statutory exclusion for "time lost" payments.

The district court concluded that the payments at issue here were excluded from RRTA taxation because the Tax Code excludes from "gross income" payments "on account of personal physical injuries." 26 U.S.C. 104(a)(2). That analysis conflates the distinct concepts of "gross income," the tax base on which income tax is collected, and "compensation," the separately defined category of payments that are taxable under the RRTA.

B. At minimum, the Treasury Department's longstanding construction of RRTA "compensation" is reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Principles of *Chevron* deference "apply with full force in the tax context." *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55-56 (2011). The Treasury Department's interpretation tracks this Court's interpretation of similar language, reasonably treats a tax statute as *in pari materia* with its benefits counterpart, and reflects a permissible understanding of the statutory history.

ARGUMENT

TAXABLE "COMPENSATION" UNDER THE RRTA INCLUDES MONEY REMUNERATION PAID AS PART OF THE EMPLOYER-EMPLOYEE RELATIONSHIP, NOT SIMPLY PAYMENTS FOR ACTIVE SERVICE

The RRTA's definition of taxable "compensation" is not limited to remuneration for time spent in active service, as the court of appeals believed, but rather encompasses such items as severance pay, vacation pay, and payments for time lost due to workplace injury. At minimum, the Treasury Department's longstanding construction to that effect, which matches this Court's interpretations of virtually identical language in other federal statutes, is reasonable and warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. RRTA "Compensation" Includes Money Remuneration Paid As Part Of The Employer-Employee Relationship

The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1). So long as a monetary payment from an employer to its employee arises out of the employment relationship, it is covered by that definition, even if it is not paid for hours of active service.

1. Under this Court's decisions, remuneration "paid to an employee for services rendered to one or more employers" includes remuneration for time not spent in active service

a. In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), this Court construed statutory language materially indistinguishable from the RRTA language

here. *Nierotko* presented the question whether the Social Security Act's definition of "wages" as remuneration for "any service ... performed ... by an employee for his employer" encompassed back pay awarded under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, for a period during which an employee had been wrongfully discharged based on union activity. 327 U.S. at 364. The government argued that the payments were not covered by the statute because they were not "for work done" and the employee "did not perform any service" to earn them. *Id.* at 365. In the present case, the court of appeals adopted substantially the same construction of the RRTA's similar language. See Pet. App. 20a (concluding that an employer's payments to an employee for time lost due to injury were not payments for "'services rendered'" because they were "for a period of time during which the employee did not actually render any services").

This Court unanimously rejected the government's argument in *Nierotko*, holding that payments for "any service * * * performed" include not only payments for "work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." 327 U.S. at 365-366. The Court stated that "[t]he very words 'any service ... performed ... for his employer,' with the purpose of the Social Security Act in mind, import breadth of coverage," and "admonish us against holding that 'service' can be only productive activity." *Id.* at 365. The Court found support for its construction in the practice of treating vacation pay, sick pay, and pay for time spent in jury service as covered "wages," even though an employee is not actively serving his employer during those periods. *Id.* at 366 n.17. Justice Frankfurter concurred

to emphasize that this view comported with longstanding interpretations of "service" in the context of employment. *Id.* at 370-371.

b. Four years ago, the Court unanimously reaffirmed this interpretation in *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014). The Court there considered whether severance payments were subject to FICA tax as payments for "any service, of whatever nature, performed . . . by an employee for the person employing him." *Id.* at 1399 (citation omitted). Applying *Nierotko*, the Court held that such payments were taxable because "the term 'service,' used with respect to Social Security, 'means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.'" *Id.* at 1400 (citation omitted).

c. The lost-wages award in this case falls within the understanding of payment for "service" that *Nierotko* and *Quality Stores* reflect. Petitioner's payment for days of work that respondent missed due to an injury caused by employer negligence was clearly made as part of "the entire employer-employee relationship." *Nierotko*, 327 U.S. at 366; see *id.* at 365-368 (finding that back pay for time in which an employee was not working due to unlawful discharge constituted payment arising from "the entire employer-employee relationship"). And there is no meaningful textual difference between the two statutory provisions that would warrant divergent results. Compare 26 U.S.C. 3231(e)(1) (RRTA's definition of "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers") with *Nierotko*, 327 U.S. at 364 (Social Security Act's

definition of "wages" as "all remuneration" for "any service ... performed ... by an employee for his employer"); *Quality Stores*, 134 S. Ct. at 1399 (same definition in FICA).

In discounting the significance of *Nierotko* and *Quality Stores*, the court of appeals overlooked an important aspect of the relevant statutory language. The court stated that "the FICA definition cannot be imported into the RRTA because instead of taxing payment for 'services,' the FICA taxes payment for 'employment.'" Pet. App. 20a (some internal quotation marks omitted). But while FICA defines "wages" as "all remuneration for employment," 26 U.S.C. 3121(a), it defines "employment" as "any service, of whatever nature, performed * * * by * * * an employee for the person employing him," 26 U.S.C. 3121(b). In both *Nierotko* and *Quality Stores*, the Court therefore focused on the same interpretive question that is presented here—whether an employer payment that is based on the employer-employee relationship, but covers a period in which the employee is not performing active work, constitutes payment for employee "service." See *Quality Stores*, 134 S. Ct. at 1399; *Nierotko*, 327 U.S. at 366.

2. The statutory context confirms that the RRTA's definition of "compensation" extends beyond payments for active service and encompasses pay for time lost

The larger statutory context reinforces the conclusion that the RRTA's definition of "compensation" encompasses items like vacation pay, severance pay, and pay for time lost, which are not linked to specific hours of active service but which arise out of the employer-employee relationship.

a. The express statutory exceptions to the RRTA's definition of "compensation" reflect the understanding that "compensation" reaches all payments arising out of the employer-employee relationship. Payments that an employer makes "on account of sickness or accident disability" are exempted from RRTA taxation if they are made under worker's compensation laws or under the RRA. 26 U.S.C. 3231(e)(1) and (4)(A). And payments "on account of sickness or accident disability" made through any other type of employer-provided plan, as well as payments "for days of sickness" under the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, are excluded from compensation only after the employee has been separated from employment for six months. 26 U.S.C. 3231(e)(1) and (4)(B)-(C). Those exceptions reflect Congress's understanding—consistent with *Nierotko*, *Quality Stores*, and agency interpretation dating back to the year of the RRTA's enactment—that payments arising out of the employment relationship are generally "compensation" even if they are not made for specific hours spent in active service. If the RRTA's general definition of "compensation" covered only payments for active service, as the court of appeals believed, an exclusion for specific sickness and disability payments would be unnecessary.

b. The RRTA's companion benefits statute reinforces that understanding. Under the interpretive canon that related statutory provisions should be construed *in pari materia*, ambiguities in a term may be resolved by considering how the term is used in related statutes. *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) ("[I]f divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them.") (citation omitted); *United*

States v. *Stewart*, 311 U.S. 60, 64 (1940) ("[A]ll acts *in pari materia* are to be taken together as if they were one law.") (citation omitted); see *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). In analyzing whether stock could constitute "money remuneration" under the RRTA, the Court looked to the use of the term "money" in the Internal Revenue Code of 1939, ch. 2, 53 Stat. 15, which was "part of the same title as" the RRTA and was "adopted just two years later." *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018). The Court explained that several provisions of that Code "treated 'money' and 'stock' as different things," and it viewed that disparity as evidence that "money remuneration" under the RRTA did not include stock. *Ibid.*

The RRTA and RRA are "companion statute[s]," *Wisconsin Central*, 138 S. Ct. at 2073—the "interrelated parts of an overall plan designed to benefit railroad employees," *Atlantic Land & Improvement Co.* v. *United States*, 790 F.2d 853, 856 (11th Cir. 1986); see *Universal Carloading & Distrib. Co.* v. *Pedrick*, 184 F.2d 64, 66 (2d Cir.), cert. denied, 340 U.S. 905 (1950). As the court below put it, "the RRA provides benefits, while the RRTA funds them." Pet. App. 21a. Absent a clear textual indication of a contrary legislative intent, construing the RRTA to tax the same employer payments that are used to calculate RRA benefits promotes the effective administration of the overall statutory scheme.

Like the RRTA (see 26 U.S.C. 3231(e)(1)), the RRA defines "compensation" to mean "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative." 45 U.S.C. 231(h)(1). Unlike the

RRTA, however, the RRA contains the additional language "including remuneration paid for time lost as an employee." *Ibid.* The term "including" indicates that remuneration paid for time lost is "an illustrative application" of the general definition. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (discussing "includes"); see *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) ("includes" used to identify "examples" that are "illustrative"); see also *Groman* v. *Commissioner*, 302 U.S. 82, 88 (1937) ("includes" builds upon "the ordinary connotation of the [underlying] term"). The RRA definition thus indicates not only that payments for time lost are part of RRA "compensation," but also that Congress viewed such payments as a "form of money remuneration * * * for services rendered as an employee."

Given the complementary nature of the two statutes, the RRTA phrase "any form of money remuneration paid to an individual for services rendered as an employee" is likewise naturally construed to "includ[e] remuneration paid for time lost as an employee." To be sure, the "including" proviso contained in the RRA does not appear in the current RRTA. But the canon that related statutes should be construed *in pari materia* is useful precisely because it enables courts to construe an ambiguous term in one statutory provision using insights from a more detailed provision that contains the same term. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 & n.11 (1985) (treating a particular Clean Water Act provision's reference to "waters" "including wetlands adjacent thereto" as evidence that "the term 'waters' elsewhere in the [Clean Water] Act" includes wetlands) (citation omitted); *Reiche* v *Smythe*, 80 U.S. (13 Wall.) 162, 162,

164 (1872) (holding that birds should not be classified as "'other live animals'" in a tariff statute because an earlier-enacted tariff statute expressly addressed "birds" and "'water fowls'" and treated them as distinct from "animals of all kinds") (citations omitted).

3. The RRTA's history bolsters the most natural interpretation of the statutory text.

a. The original 1935 railroad workers' taxation statute defined taxable "compensation" as "any form of money remuneration *for active service*, received by an employee from a carrier." 1935 Act, ch. 813, § 1(d), 49 Stat. 974 (emphasis added). When Congress enacted the RRTA two years later, after the 1935 statute had been declared invalid, it omitted the word "active" and defined "compensation" to include "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1). That sequence suggests that the RRTA reaches not only payments for "work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Nierotko*, 327 U.S. at 365-366.

Subsequent statutory changes reinforce that inference. Later in the year that the RRTA was enacted, the Treasury Department construed the statute's definition of "compensation" as "not confined to amounts earned or paid for active service." Reg. 100, Art. 5 (1937). Instead, the regulations stated, compensation "includes amounts earned or paid for periods during which the employee or employee representative is absent from active service," *ibid.*, including "[s]ick pay, vacation allowances, or back pay upon reinstatement after wrongful discharge." *Id.* Art. 6(b). Since that time, Congress has

repeatedly amended the RRTA's definition of "compensation" against the backdrop of that interpretation and of this Court's 1946 decision in *Nierotko*. But Congress has not altered the overarching definition of "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers," 26 U.S.C. 3231(e)(1), nor has it enacted any general exclusion covering payments for time not spent in active service to an employer.

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (quoting *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991)); see *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (citation and internal quotation marks omitted). The inference of congressional ratification is particularly strong here because of the exemptions that Congress did enact. See 26 U.S.C. 3231(e)(1) and (4) (carve-outs for payments as a result of sickness or disability under only certain circumstances). Those exclusions would be superfluous if the RRTA's definition of "compensation" was limited to payments made for specific periods of active service. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (find-

ing inference of congressional ratification to be particularly strong when statutory amendments "presupposed" a point embodied in the earlier interpretations).

b. In rejecting the agency's longstanding approach, the court of appeals relied heavily on amendments that removed express references to "time lost" from the RRTA's definition of compensation. Pet. App. 21a-23a. The court misunderstood those changes.

When assessing whether a deletion of statutory text has actually narrowed the statute's scope, this Court has considered both the remaining text and the historical context. See, *e.g.*, *Kellogg Brown & Root Servs., Inc.* v. *Carter*, 135 S. Ct. 1970, 1975, 1977 (2015) (holding that limitations provision that had applied to "'offenses involving the defrauding or attempt[ing] to defraud the United States * * * now indictable under any existing statutes'" remained limited to criminal offenses even after deletion of the limiting phrase "'now indictable under any existing statutes,'" because the primary operative term "'offenses'" was unchanged and "suggest[ed] that no fundamental alteration was intended") (citation omitted); *Taylor* v. *United States*, 495 U.S. 575, 582, 590 (1990) (rejecting argument that the deletion of a definition of burglary "indicate[d] Congress's intent to reject that definition," when the "general purpose and approach" of the statute continued to support the application of the deleted definition and legislative history did not counsel otherwise). Here, the amendments that removed the RRTA's express references to "time lost" were part of a series of changes to shift RRTA taxation from a when-earned to a when-paid basis, and they are not reasonably read as creating an exclusion for time-lost payments in the statute.

i. The RRTA initially defined "compensation" as "any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost as an employee* * * * *remuneration paid for time lost shall be deemed earned in the month in which such time is lost.*" 1937 RRTA § 1(e), 50 Stat. 436 (emphasis added). It thus identified "time lost" as a "form of money remuneration * * * for services rendered," and it specified when such payments should be "deemed earned." The latter feature was important because the RRTA then taxed compensation when it was earned, not when it was paid.

Congress removed that discussion in a series of changes that shifted the obligation to pay RRTA taxes to the time at which the relevant compensation was paid. In 1946, Congress replaced language requiring each employee to pay taxes on "compensation * * * earned by" him with language requiring the employee to pay taxes on compensation "paid to" him. 1946 Act § 2, 60 Stat. 722. The same provision established a "presum[ption]" that compensation was earned in the period in which it was paid. *Ibid.* But the IRS continued to hold the view, ultimately reflected in a 1975 Revenue Ruling, that certain back pay should be taxed at the rate applicable when the back pay was earned, not at the rate that applied when it was paid. See Rev. Rul. 75-266, 1975-2 C.B. 408.

Shortly after that 1975 Revenue Ruling, Congress enacted the first of the changes on which the court below relied. The 1975 law foreclosed any time-of-earnings inquiry unless one was sought by the employee, by specifying that "[a]n employee shall be deemed to be

paid compensation in the period during which such compensation is earned only upon a written request by such employee." 1975 Act § 206, 89 Stat. 466. And, as relevant here, the law revised the definition of "compensation" to ensure that the obligation to pay tax would arise when the relevant compensation was paid. It accomplished that result by changing the basic definition of "compensation" from "any form of money remuneration earned by" an employee, 26 U.S.C. 3231(e)(1) (1970), to "any form of money remuneration paid to" an employee. 1975 Act §§ 204-205, 89 Stat. 466. And it removed the definition's references to "time lost," including the language stating that "remuneration paid for time lost shall be deemed earned in the month in which such time is lost." 26 U.S.C. 3231(e)(1) (1970); see 1975 Act § 204, 89 Stat. 466.

By the time of the 1975 amendment, *Nierotko* and the Treasury regulations confirmed that the RRTA's overarching definition of "compensation"—as "any form of money remuneration, earned by an employee for services rendered as an employee to one or more employer"—reached payments for periods not devoted to active service, such as payments for time lost. The pre-1975 version of the RRTA, moreover, which contained the same "including" language that still appears in the RRA, made clear that Congress viewed "remuneration paid for time lost as an employee" as a "form of money remuneration * * * for services rendered as an employee." See p. 4, *supra*. If Congress had intended to exclude such payments from taxable RRTA "compensation," the deletion of express references to "time lost," while leaving intact the basic definition that had long been understood to "includ[e]" such payments, would have been a very oblique way of accomplishing

that result. That is a particularly implausible inference given the 1975 amendment's primary purpose of confirming the applicability of a when-paid approach to RRTA taxation. If the 1975 Congress had actually sought to achieve the result that the court below attributed to it, Congress presumably would have enacted an express exclusion, as it later did for a subset of payments that are not for active service (certain payments based on sickness and disability).

The 1975 amendment, moreover, left in place other RRTA references to time lost. Although Congress removed the reference to "time lost" in the definition of "compensation" at 26 U.S.C. 3231(e)(1), it retained in the next subsection a provision dealing with identification of time-lost pay. That provision set out a rule for identifying when injury-related payments should be considered payment for time lost, rather than non-taxable payments for other costs (*e.g.*, medical expenses) associated with an injury. It specified that, "[i]f a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost." 26 U.S.C. 3231(e)(2) (1976). Congress's retention of that provision would have served no evident purpose if Congress had intended to exclude payments for time lost from the RRTA's definition of "compensation."

ii. Congress also did not exempt payments for time lost from RRTA taxation when "[t]echnical [a]mendments" enacted in 1983 deleted guidance concerning when payments "shall be deemed" to be for time lost. See 1983 Act § 225, 97 Stat. 424 ("Technical Amendments"). The Railroad Retirement Solvency Act of 1983

increased the RRTA's tax rates and annualized the wage base, in an effort to shore up the railroad retirement system's finances. §§ 211-226, 97 Stat. 419-426. The Railroad Retirement Board (Board) estimated that, absent the legislation, the Board would have needed to cut Tier 2 benefits by 40% in 1983 and 80% in 1984. Soc. Sec. Admin., *Recent Changes to the Railroad Retirement Act* (1983), https://www.ssa.gov/policy/docs/ssb/v46n12/v46n12p14.pdf. A final section of the 1983 statute, entitled "Technical Amendments" and subtitled "Amendments Relating to Application of Contribution Base on an Annual Basis," replaced the entirety of Subsection (e)(2)—which had included the statute's guidance on identifying payments for "time lost," 26 U.S.C. 3231(e)(2) (1982)—with a new subsection. 1983 Act § 225, 97 Stat. 424. The new subsection, entitled "Application of Contribution Bases," set out technical rules for determining the wage base. *Ibid.*; 26 U.S.C. 3231(e)(2).

These changes are not appropriately read to have excised "time lost" from the scope of taxable "compensation." They left the RRTA's definition of "compensation" unaltered, and simply eliminated guidance on when an employee "shall be deemed" to have been paid for time lost, 26 U.S.C. 3231(e)(2) (1982). 1983 Act § 225, 97 Stat. 424. The 1983 statute's labeling of the relevant provision as a technical amendment makes it especially unlikely that Congress intended the changes to add an implicit, substantive exemption to the RRTA's definition of compensation. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016); *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316 (2001). Reading the 1983 amendments to create a *sub silentio*

tax exemption for time-lost payments would also conflict with the statute's overall purpose of shoring up the Board's finances. See 1983 House Report 25 (explaining that the bill increased tax rates and annualized the statute's wage bases "[i]n light of the need of the retirement system for additional revenues"). And the most relevant legislative report did not suggest any such purpose, but instead mirrored the language of the statute, describing the changes to Subsection (e)(2) as "technical and conforming amendments" implementing the shift from a monthly wage base to an annual wage base. *Id.* at 29.

The sequence of RRTA amendments that removed the prior express references to "time lost" thus were designed to shift RRTA taxation from an as-earned to as-paid basis, and to make certain technical changes. Those amendments are not reasonably read to exclude time-lost payments from the statute's definition of "compensation."

4. The income-tax exclusion for "payments on account of personal physical injuries" does not apply to RRTA taxation.

The district court concluded that the payments here are exempted from RRTA taxation because payments "on account of personal physical injuries" are excluded from the definition of "gross income" used in the federal income-tax provisions. See Pet. App. 29a-30a (discussing 26 U.S.C. 104(a)(2)). That reasoning conflates distinct statutory provisions.

RRTA taxes and income taxes are levied on different tax bases. Federal income taxes are imposed on "taxable income," see 26 U.S.C. 1, 11, which is defined as "gross income" minus certain deductions. 26 U.S.C. 61

and 26 U.S.C. 63 (2012 & Supp. IV 2016). "Gross income," in turn, "means all income from whatever source derived," subject to certain exclusions. See 26 U.S.C. Subt. A, Ch. 1, Subch. B., Pt. III ("Items Specifically Excluded from Gross Income"). One exclusion provides that "gross income does not include * * * the amount of any damages * * * received * * * on account of personal physical injuries or physical sickness." 26 U.S.C. 104.

The RRTA taxes "compensation"—a distinct term with a defined meaning. The RRTA's definition of "compensation" does not incorporate or cross-reference the categories of "taxable income" or "gross income." And the RRTA's definition of "compensation" does not contain a parallel exception for damages received "on account of personal physical injuries or sickness." 26 U.S.C. 104. The statutory carve-outs from "gross income" under the income-tax laws therefore are irrelevant under the RRTA.

When Congress has created exclusions from income taxation, it has sometimes—but not always—added parallel exclusions to the RRTA. See Pet. Br. 41 (describing parallel exclusions for employee achievement awards, certain payments for student-loan forgiveness, certain fringe benefits, employer-provided educational assistance, certain employer-provided meals and lodging, medical savings account contributions, and employer contributions to health savings accounts). Congress's selective enactment of parallel exclusions refutes the district court's suggestion that exclusion of a particular category of payment from the definition of taxable income *automatically implies* a parallel exclusion from RRTA "compensation."

Several appellate courts have held that FICA's definition of "wages" implicitly incorporates an exclusion for payments made on account of personal injury—though some of those courts have concluded that any "back pay" component of such payments would be taxable. See *Gerbec* v. *United States*, 164 F.3d 1015, 1026 (6th Cir. 1999) (back pay taxable); *Dotson* v. *United States*, 87 F.3d 682, 689 (5th Cir. 1996) (same); *Redfield* v. *Insurance Co. of N. Am.*, 940 F.2d 542, 548 n.4 (9th Cir. 1991) (back pay not taxable), overruled on other grounds by *Commissioner* v. *Schleier*, 515 U.S. 323 (1995). And some government filings, including the government's court of appeals brief in this case, have described FICA as incorporating a personal-injury exclusion. See Gov't C.A. Br. 12-16.*

The government believes those characterizations of FICA erroneously conflate distinct concepts of "gross income" under the income-tax provisions and "wages" under FICA. But regardless of how FICA is understood, it would be improper to exempt payments for time lost due to personal injury from RRTA taxation, based on a gross-income exclusion that has not been incorporated into the RRTA. While neither FICA nor the Social Security Act contains an express reference to payments for "time lost," such payments are expressly included in the RRA's definition of "compensation,"

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* In a Technical Advice Memorandum to a taxpayer, the IRS stated that it agreed with the *Dotson* court that payments on account of personal injury are not taxable under FICA. Internal Revenue Service, *Technical Advice Memorandum 115068-09*, at 36 (2010). It is not clear that this statement was meant to encompass back pay, because *Dotson* treated back pay due to personal injury as taxable. In any event, guidance in such memoranda "applies only to the taxpayer for whom the advice was required." *Internal Revenue Manual* 33.2.1.9.1 (2004).

45 U.S.C. 231(h)(2), 231b, and those payments can therefore increase employees' retirement and disability benefits. It therefore would be inappropriate to interpret the parallel RRTA and RRA definitions differently —and to introduce asymmetry between the tax and benefit provisions that apply to railroad workers—in order to align the RRTA's definition of "compensation" with the distinct concept of "gross income."

B. The Treasury Department's Longstanding Construction Of RRTA "Compensation" Is Reasonable And Warrants Deference

For the reasons explained above, under the RRTA's plain meaning, RRTA "compensation" extends to all payments arising out of the employer-employee relationship, and is not limited to payments for periods of active service. Even if there were ambiguity in the RRTA's definition of compensation, however, the Treasury Department's interpretation would warrant deference under the principles of *Chevron*. *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55 (2011) (applying *Chevron* "in the tax context").

At minimum, the Treasury Department acted reasonably in concluding that "[t]he term compensation [in the RRTA] is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer," 26 C.F.R. 31.3231(e)-1(a)(3) (emphasis omitted), and therefore includes "pay for time lost," 26 C.F.R. 31.3231(e)-1(a)(4). That interpretation is supported by this Court's longstanding interpretation of virtually identical language in FICA. See pp. 16-19, *supra*. It is reinforced by the express ex-

clusions from RRTA taxation of a narrow subset of payments for time not spent on active service, see 26 U.S.C. 3231(e)(1) and (4)(A), and by the companion benefits statute's directive that an identically worded basic definition of "compensation" "includ[es] remuneration paid for time lost as an employee," 45 U.S.C. 231(h)(1). The Treasury Department adopted its definition of "compensation" in 1937, the year the RRTA was enacted. Since that time, Congress has added narrow exemptions to the statute, but it has never altered the overarching definition of "compensation" or added an exclusion for "time lost."

In finding the Treasury Department's interpretation to be unreasonable, the court of appeals relied in substantial measure on Congress's removal from the RRTA of prior language specifying that the basic statutory definition of "compensation" —*i.e.*, "money remuneration * * * for services rendered as an employee"— "includ[es] remuneration paid for time lost as an employee." See Pet. App. 21a-22a (citation omitted). As explained above, however, that revision is not reasonably understood to create an RRTA exclusion for "time lost" payments, but was instead part of a set of revisions designed to serve other purposes. See pp. 23-30, *supra*. And even if the court of appeals' inference reflected *one* reasonable explanation for Congress's deletion of the prior language, the RRTA's current definition of "compensation" does not *unambiguously* exclude payments for time lost. The Treasury Department thus acted reasonably when it declined to construe revisions eliminating any statutory discussion of "time lost" as creating an implicit exclusion not set out in the statute's text.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 26 U.S.C. 3231 provides in pertinent part:

Definitions

* * * * *

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided

any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a

similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

* * * * *

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of

this chapter as the employer with respect to such compensation.

* * * * *

2. 45 U.S.C. 231(h)(1) provides:

Definitions

(h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231h of this title, the period during which such compensation will have been earned.

3. 26 C.F.R. 31.3231(e)-1 provides:

Compensation.

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121(a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see § 31.3123-1.

(3) The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a

less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see § 31.3121(a)-3. For rules regarding the inclusion of fringe benefits in compensation, see § 31.3121(a)-1T.

(6) *Split-dollar life insurance arrangements.* See §§ 1.61-22 and 1.7872-15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

(b) *Special Rules.* (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of § 31.3231(b)-1.

No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

MICHAEL D. LOOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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Table of Contents

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 7

I. THE COURT BELOW CORRECTLY HELD THAT AN AWARD OF DAMAGES FOR PERSONAL INJURY, INCLUDING LOST WAGES, IS NOT "COMPENSATION" TAXABLE UNDER THE RAILROAD RETIREMENT TAX ACT. 7

A. The Plain Text and Legislative History of the RRTA Establishes Congress's Intent to Exclude Damages Awarded for Lost Wages on Account of Personal Injury. 8

B. The Definition of "Compensation" in the Railroad Retirement Act Does Not Alter the Definition Congress Set Out in the RRTA. 10

C. The IRS Regulation Is Not Entitled to Deference in this Case. 13

D. To the Extent the RRTA Definition of Compensation is Ambiguous, this Court Should Construe the Provision in Respondent's Favor. 16

II. DAMAGES AWARDED IN FELA ACTIONS ON ACCOUNT OF PHYSICAL INJURY ARE NOT "INCOME" AND THEREFORE NOT SUBJECT TO EMPLOYMENT TAXES, INCLUDING RAILROAD RETIREMENT TAXES. 17

B. Exclusion of awards for lost income from both federal income tax and federal employment taxes, including the RRTA, supports the policy underlying § 104(a)(2). 24

C. The Non-Taxability of Plaintiff's Award for Lost Income on Account of Personal Injury under the RRTA Is Consistent with the Non-Tax Treatment of Personal Injury Awards Under FICA Employment Taxes. 25

III. PERMITTING RAILROADS TO WITHHOLD RRTA TAXES ON FELA AWARDS FOR LOST WAGES WILL IMPEDE FAIR SETTLEMENTS OF FELA CLAIMS. 30

A. Congress Intended FELA to Provide Fair Compensation to Injured Workers and Financial Incentive for Railroads to Invest in Workplace Safety. 30

B. RRTA Taxation of FELA Awards Will Impede Fair Settlement Negotiations and Reduce Funding for Railroad Retirement Benefits 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases

Andress v. United States,
198 F. Supp. 371 (N.D. Ohio 1961) 16, 25

Bowers v. New York & Albany Lighterage Co.,
273 U.S. 346 (1927)..... 16

Comm'r v. Glenshaw Glass Co.,
348 U.S. 426 (1955)..... 18

Comm'r v. Schleier,
515 U.S. 323 (1995)..... 19

Consol. Rail Corp. v. Gottshall,
512 U.S. 532 (1994)..... 31, 32

Cowden v. BNSF Ry. Co.,
No. 4:08CV01534, 2014 WL 3096867
(E.D. Mo. July 7, 2014) 29

CSX Transp., Inc. v. McBride,
564 U.S. 685 (2011)..... 31

Dotson v. United States,
87 F.3d 682 (5th Cir. 1996)..... 24, 27

Erlenbaugh v. United States,
409 U.S. 239 (1972)..... 11

Gerbec v. United States,
164 F.3d 1015 (6th Cir.1999)..... 27

Hall v. Chicago & Nw. Ry. Co.,
125 N.E.2d 77 (Ill. 1955) 25

Hassett v. Welch,
303 U.S. 303 (1938) 16

Haynes v. United States,
353 U.S. 81 (1957) 24

Healthpoint, Ltd. v. C.I.R.,
102 T.C.M. (CCH) 379, 2011 WL 4550112
(T.C. 2011) 34

Heckman v. BNSF Ry. Co.,
837 N.W. 2d 532 (Neb. 2013) 15, 30, 34

Helvering v. Clifford,
309 U.S. 331 (1940) 18, 21

Huddell v. Levin,
395 F. Supp. 64 (D.N.J. 1975) 24

Liberatore v. Monongahela Ry. Co.,
No. 1011-EDA-2015, 2016 WL 1381861
(Pa. Super. Ct. Apr. 7, 2016) 30, 35

Louissaint v. Hudson Waterways Corp.,
443 N.Y.S.2d 678 (N.Y. Sup. Ct. 1981) 24

Loy v. Norfolk S. Ry. Co.,
No. 3:12-CV-96, 2016 WL 1425952
(N.D. Ind. Apr. 12, 2016) 29

Marlin v. BNSF Railway Co.,
163 F. Supp. 3d 576 (S.D. Iowa 2016) 29

Mickey v. BNSF Ry. Co.,
437 S.W.3d 207 (Mo. 2014) 29

Mickey v. BNSF Ry. Co.,
No. ED98647, 2013 WL 2489832
(Mo. Ct. App. June 11, 2013) 15

Munoz v. Norfolk S. Ry. Co.,
2018 IL App (1st) 171009, 2018 WL 2728696
(Ill. App. Ct. June 5, 2018) 30

Norfolk & W. Ry. Co. v. Chittum,
468 S.E.2d 877 (Va. 1996) 23

Phillips v. Chicago Cent. & Pac. R.R. Co.,
853 N.W.2d 636 (Iowa 2014) 30, 34

Pipitone v. United States,
180 F.3d 859 (7th Cir. 1999) 18

Redfield v. Ins. Co. of N. Am.,
940 F.2d 542 (9th Cir. 1991) 27

Roemer v. Comm'r,
716 F.2d 693 (9th Cir. 1983) 25

Rowan Companies, Inc. v. United States,
452 U.S. 247 (1981) 25, 26

United Dominion Indus., Inc. v. United States,
532 U.S. 822 (U.S. 2001) 16

United States v. Merriam,
263 U.S. 179 (1923) 16

United States v. Quality Stores, Inc.,
572 U.S. 141 (2014) 27

Wachovia Bank v. Schmidt,
546 U.S. 303 (2006) 11

Windom v. Norfolk Southern Railway Co.,
No. 5:10-CV-407, 2012 WL 6096990
(M.D. Ga. Dec. 7, 2012) 23

Wisconsin Cent. Ltd. v. United States,
138 S. Ct. 2067 (2018) 20

Statutes and Regulations

26 U.S.C. § 104 ..... 7, 18

26 U.S.C. §§ 3201-3233 ..... *passim*

26 U.S.C.A. § 61 18

26 U.S.C.A. § 3201 20

26 U.S.C.A § 3231 13

40 Stat. 1057 (1919) 20

45 U.S.C. § 231 ..... 10, 11, 12

45 U.S.C. § 51 31

Pub. L. No. 97-473, 96 Stat. 2605, § 1605 21

Pub. L. No. 101-239, 103 Stat. 2106, § 7641 21

Pub. L. No. 104-188, 110 Stat. 1755, § 1605 21

26 C.F.R. § 31.3231(e)-1 29

26 C.F.R. §31.3202-1 32

Other Authorities

2B Sutherland Statutory Construction § 51:3 (7th ed.) 11, 13

40 Cong. Rec. 4605 (1906) 31

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial lawyer members practice in every state. AAJ members primarily represent plaintiffs in personal injury suits, as well as in employment, consumer, and civil rights actions. Attorneys representing railroad workers in Federal Employers Liability Act ("FELA") actions are frequently AAJ members.

Congress has for sound reasons excluded payments on account of personal physical injury from "income" for purposes of federal income taxes. AAJ believes that for the courts to create a different rule for employment taxes or for railroad employers not only undermines the intent of Congress, but would upset settled expectations regarding the tax consequences of personal injury recoveries and make settlement agreements in FELA cases more difficult to reach.

SUMMARY OF ARGUMENT

I. The Eighth Circuit Court of Appeals correctly held in this case that Respondent's award of damages for lost income due to personal injury was not subject to withholding of railroad retirement taxes.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

Payment of Respondent's FELA judgment was not taxable "compensation" under the Railroad Retirement Tax Act. The RRTA defines compensation as money paid "for services rendered." Thus the plain text of the statute does not encompass payments for services *not* rendered due to personal injury caused by the railroad's negligence.

Indeed, the RRTA definition previously taxed payments for "time lost" including time lost due to personal injury. Congress specifically removed those provisions, making the statute unambiguous regarding congressional intent to make such payments non-taxable under the RRTA. Petitioner and the United States as amicus speculate as to the meaning of these amendments, but proffer no reliable evidence that Congress intended to impose railroad retirement taxes on FELA personal injury awards.

There is no basis to import into the RRTA the definition of "compensation" in the Railroad Retirement Act, which includes "time lost." Related statutory provisions may be construed *in pari materia* if they have the same subject matter and share the same purpose. In this instance, the RRTA defines compensation for the purpose of imposing taxes on rail workers that fund retirement benefits. The RRA defines compensation more broadly so that workers may be credited for time lost due to injury for purposes of qualifying for pension benefits. This purpose, as the Railroad Retirement Board itself recognizes, has nothing to do with taxation. Construction *in pari materia* does not support shoehorning "time

lost" back into the RRTA definition of "compensation" after Congress expressly deleted it.

Nor should this Court reinsert the term back into RRTA based on deference to the IRS interpretation of the statutory text. It is true that the accompanying Treasury regulation has long included "time lost" in its interpretation of RRTA compensation. But payments for "time lost" include a variety of types of remuneration. Only payments for past wages lost on account of personal injury are disputed. Crucially, the Treasury regulation omits reference to personal injury, which had been part of the statutory definition until deleted by Congress. The IRS appears to have set out its current view only in litigation in amicus briefs. Deference to that position is not warranted.

To the extent that the RRTA definition of taxable "compensation" is at all ambiguous, this Court should be guided by the well-settled cannon of construction of tax statutes in favor of the taxpayer.

II. An alternate and more direct answer to the question presented in this case is that, regardless of whether Respondent's FELA award is "compensation," it is not subject to railroad retirement taxes because it is not "income" as defined by the Internal Revenue Code.

Although Congress cast a wide net in imposing a tax on "income," Congress also legislated specific exemptions from that category, including pay-

ment of tort damages "on account of personal physical injuries." 26 U.S.C. § 104(a)(2). This exclusion includes awards for lost income due to injury, and it has remained so through a number of amendments to the section.

It is true that this exclusion is set out in the portion of the Code relating to federal income taxes. But Tier 1 and Tier 2 retirement taxes under the RRTA are also "imposed on the income" of employees. Petitioner proposes that Congress, *sub silentio*, intended different meanings for the basic term "income" in different portions of the tax code. That suggestion is made more improbable by the fact that following enactment of the RRTA in 1937 thousands of on-the-job railroad injuries have occurred each year involving time lost from work. Yet, conventional practice has treated FELA awards for lost wages as not subject to RRTA taxes. Congress took no action to correct what Petitioner argues was erroneous application of the statute. In fact, no suggestion that FELA awards might be subject to RRTA taxes appeared in any court opinion until a district court rejected such an argument in 2012.

The more sensible construction would be that Congress intended "income" to carry the same meaning, including the same exclusions, for both income tax and employment taxes, including the RRTA retirement taxes. Such a construction would be consistent with the intent of Congress in enacting this exclusion: To relieve the taxpayer who has received wrongful physical injury of the burden of tax liability for tort awards for income lost due to that injury.

This construction is also consistent with the non-tax treatment of injury awards by the other major federal employment tax, the Federal Insurance Contributions Act ("FICA") tax, which funds Social Security benefits. It is well-settled among the courts, and acknowledged by the IRS, that tort recoveries for lost wages on account of personal injury are not subject to FICA taxes. The policy that underlies that rule, the administrative convenience of defining identical terms in the tax code identically, also supports the interpretation of "income" for RRTA purposes identically to "income" for federal income tax purposes.

This Court should hold, in accordance with the well-reasoned decisions by the majority of courts to have addressed this issue, that FELA personal injury awards for past lost wages, even if deemed compensation under RRTA, are nonetheless not taxable because they are excluded from "income."

III. Permitting railroads to withhold RRTA taxes from FELA awards for past lost wages undermines the beneficial congressional purpose served by FELA and impedes fair settlements of FELA claims that involve lost wages. Congress enacted the FELA in response to widespread on-the-job injuries and deaths among rail workers. By establishing a statutory negligence cause of action, Congress intended both to provide compensation for wrongfully injured workers and their families, and to provide a financial incentive for railroads to invest in safe work places for their employees. Although railroading is now safer, workers still face serious risks of harm in

the workplace. A rule subjecting FELA awards to RRTA tax will diminish the net compensation recoverable by injured claimants.

Trial lawyers who represent injured rail employees and their families are also concerned that railroad defendants will weaponize such a rule to obtain unfair advantage in settlement negotiations. At the outset, it is clear that a rule allowing a FELA defendant to deduct RRTA taxes from a judgment entered upon a jury verdict does not financially advantage the defendant. Amounts withheld must be remitted to the IRS, along with the railroad's own RRTA contribution. Petitioner and amicus Association of American Railroads ("AAR") contend that such a taxability rule is needed to maintain a reliable and stable source of funding for the railroad retirement system. There is no indication that the current non-taxability rule has undermined the system's viability.

But most FELA claims are settled. The rule sought by Petitioner will arm railroads with a potent weapon for use in settlement negotiations with injured workers. Under that rule, where all or part of a verdict award would be subject to RRTA taxes, the railroad can reduce its settlement offer by proposing to allocate little or none of the settlement amount to lost past income. The parties' allocation of settlement proceeds generally dictates the tax consequences. In this manner, the railroad will be able to extract a lower settlement than it might otherwise obtain through negotiations, including settlements following a jury verdict. At the same time, such a

settlement avoids payment of Tier 1 and Tier 2 taxes both the plaintiff and the employer. Consequently, the only beneficiaries of the taxability rule Petitioner seeks are Petitioner and other railroads facing negligence actions under FELA.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT AN AWARD OF DAMAGES FOR PERSONAL INJURY, INCLUDING LOST WAGES, IS NOT "COMPENSATION" TAXABLE UNDER THE RAILROAD RETIREMENT TAX ACT.

AAJ addresses this Court on the sole issue in this case: Whether Plaintiff's FELA award of damages for lost income due to personal injury is subject to the Railroad Retirement Tax Act ("RRTA"), 26 U.S.C. §§ 3201-3233.

AAJ believes that the Eighth Circuit was correct in holding that "compensation" paid "for services rendered" under RRTA does not include payment to Michael Loos for services not rendered due to his wrongful injury. AAJ also believes, and will demonstrate in Part II, that even if the award may be deemed RRTA "compensation," it is not taxable because it is excluded from gross income under 26 U.S.C. § 104(a)(2).

A. The Plain Text and Legislative History of the RRTA Establishes Congress's Intent to Exclude Damages Awarded for Lost Wages on Account of Personal Injury.

Petitioner frames the "threshold issue before this Court [as] whether the RRTA's definition of taxable compensation includes pay for time lost." Pet. Br. 17. The plain text of the statute yields a clear answer.

The RRTA defines "compensation" as "any form of money remuneration paid to an individual *for services rendered as an employee* to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis added). Contrary to Petitioner's assertion, the payment to Michael Loos does not "fit comfortably within this definition." Pet. Br. 17. That payment was not for services rendered, but in satisfaction of a judgment debt entered by the district court following the jury's verdict against BNSF. That verdict and judgment did not compensate Loos for an amount owed for services rendered, but for the amount Loos was unable to earn because he could not perform his job due to BNSF's negligence. The court properly found that payment for services not rendered does not fit well within the definition of compensation for services rendered. *See* Pet. 20a.

Importantly, the RRTA originally made provision in its definition of compensation for "time lost," including time away from active service due to personal injury.[2] Congress specifically stripped out

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[2] RRTA formerly provided:

those provisions by amendments in 1975 and 1983. *See* U.S. Br. 6-9. The court below accurately found from both the plain text and this legislative history that "the RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" Pet. 24a. It is highly improbable that Congress would have removed references to "time lost" due to personal injury from the definition of RRTA compensation, all the while secretly and silently intending to keep such "time lost" as part of the definition.

Both Petitioner and the United States expend considerable effort and ink to fill that silence. *See*

> (1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost* as an employee . . .
>
> (2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, *including absence on account of personal injury* . . .

26 U.S.C. § 3231(e)(1)-(2) (1970) (emphasis added).

Pet. Br. 18-23; U.S. Br. 16-20. They accomplish little more than describing what is facially obvious: that Congress "removed the last references to pay for time lost in the RRTA's definition of compensation" and "Congress inserted in its place rules about payments in excess of base compensation." Pet. Br 8. *See also* U.S. Br. 25 (speculating that the amendments "were part of a series of changes to shift RRTA taxation from a when-earned to a when-paid basis.") Neither Petitioner nor the United States offers any reliable indicator of Congress's intent in deleting provisions relating to time lost and personal injury. They certainly point to no evidence of congressional intent to impose railroad retirement taxes on FELA personal injury awards.

B. The Definition of "Compensation" in the Railroad Retirement Act Does Not Alter the Definition Congress Set Out in the RRTA.

Remarkably, Petitioner insists in the face of those statutory amendments that "the RRTA is unambiguous in including pay for time lost within taxable compensation." Pet. Br. 34. The United States, for its part, concedes that "compensation" is "an ambiguous term" in the statute. U.S. Br. 22. Both, however, seek to borrow from the definition of compensation set out in the Railroad Retirement Act, 45 U.S.C. § 231 ["RRA"], to reinsert "time lost" back into the RRTA definition. The RRA defines "compensation" as:

> [A]ny form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee . . .

45 U.S.C. § 231(h)(1).

Petitioner and the United States propose that this Court invoke the canon that "related statutory provisions should be construed *in pari materia*" to import "time lost" back into the RRTA definition of "compensation." U.S. Br. 20; *see* Pet. Br. 25.

Courts resort to this interpretive canon cautiously, recognizing that they look beyond the four corners of the legislation Congress had before it. Construction *in pari materia* is not appropriate where statutes are simply "related." Rather, one statutory provision can take meaning from another only where they are "statutes addressing the same subject matter" that may fairly be read "as if they were one law." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). *See also* 2B Sutherland Statutory Construction § 51:3 (7th ed.) (The most important characteristic of statutes that may be read *in pari materia* is that they "have the same purpose or object.").

The statutes at hand, however, address entirely different subjects and aim to accomplish different objectives. The RRTA is administered by the

IRS to collect taxes that will fund railroad retirement benefits. By contrast, Congress in the Railroad Retirement Act, 45 U.S.C. § 231, established the Railroad Retirement Board to disburse benefits from the retirement account and to determine whether an employee has met the requirements for benefit eligibility. Among those requirements, an employee must be credited with 360 months of service to qualify for the maximum pension benefit. See 45 U.S.C. § 231a & § 231f. In making that calculation, the Board looks to compensation received by the employee for identifiable time periods. *See* Railroad Retirement Information Pamphlet, Dated May 2008, Joint Appendix ("JA") 65a-66a. The Board's responsibility has nothing to do with assessing taxes, and its definition of "compensation" may for valid reasons differ from the IRS's. For example, as the Board has explained, giving broader scope to "compensation" may benefit the employee who has been injured by providing "additional months of creditable service needed to qualify for railroad retirement benefits." *Id.* at 64a.

In addition, the Railroad Retirement Board has made clear that the fact that compensation is creditable for pension purposes does not necessarily mean it is taxable for RRTA purposes. To the contrary, "[t]here are circumstances where pay for time lost may be fully creditable under the Railroad Retirement Act, but taxable only to a limited extent, or not taxable at all, under the Railroad Retirement Tax Act." U.S. R.R. Retirement Bd., *Pay For Time Lost From Regular Work*, 10 (2017), *available at* https://www.rrb.gov/Benefits/IB-4.

It is therefore wholly inappropriate to attempt to use the RRA's broad non-tax definition of compensation in order to resolve taxability questions under the RRTA. Petitioner's facile assertion that the two statutes are merely "different sides of the same coin," Pet. Br. 25, is unconvincing. "Courts routinely find that several acts treating the same subject, but having different objects, are not *in pari materia*." Sutherland, *supra*, at § 51:3.

Tellingly, Petitioner itself argues that "where Congress had previously defined compensation as 'active service' but dropped this requirement from the statute in 1937," the court may not read that phrase back into the law. Pet. Br. 21. By the same token, the Eighth Circuit properly declined to shoehorn "time lost" back into the RRTA definition of "compensation" after Congress had explicitly removed it. Pet. 23a-24a.

C. The IRS Regulation Is Not Entitled to Deference in this Case.

Petitioner and the United States as amicus argue that, even if this Court determines that 26 U.S.C.A. § 3231(e)(1) does not unambiguously include Michael Loos's lost wages in the definition of compensation, this Court should give great deference to the accompanying IRS regulation.[3] Pet. Br. 34-37; U.S. Br. 33-34.

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[3] "The term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . ." 26 C.F.R. § 31.3231(e)-1(a)(3).

Petitioner emphasizes that for many years "the IRS has maintained that compensation does not require active service," despite Congress's multiple amendments to the RRTA's definition of compensation. Pet. Br. 35-36. That regulation, however longstanding, does not clearly state that the IRS interprets the definition of compensation to include personal injury awards for lost income.

Neither Petitioner nor the United States has identified an IRS regulation that specifically interprets RRTA "compensation" to include such damages. Indeed, the phrase "including absence on account of personal injury," which was present in the statutory definition until removed by Congress, *see* footnote 2, does not appear in the IRS regulation at all. No amount of deference to the agency's regulation supports incorporating time lost payments for personal injury into the RRTA definition of compensation where the regulation itself has conspicuously omitted "on account of personal injury."

Petitioner points to a 1961 revenue ruling in which the IRS held that a FELA award for personal injuries was not subject to federal income tax, including the amount awarded for lost wages. Pet. Br. 43-44. In the last sentence, the IRS stated, "The fact that in this case 'time lost payments' constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for Federal income tax purposes." Rev. Rul. 61-1, 1961-1 C.B. 14, 1961 WL 12630 (1961). This single sen-

tence appears only in a revenue ruling, not a regulation. It was not responsive to the taxpayer's query, nor did it state directly that a FELA award for lost wages is taxable, and it was not supported by any analysis or authority.

In fact, seven years thereafter, the IRS ruled that payments made solely in consideration for a "personal injury release" which releases a railroad from liability "are not remuneration for 'time lost' within the meaning of the Railroad Retirement Tax Act and, therefore, are not compensation for purposes of the taxes imposed by that Act." Rev. Rul. 68-416, 2 C.B. 473 (1968). Thus, even when the RRTA previously included "pay for time lost," the IRS recognized that a railroad's payment in exchange for a release from liability is not taxable compensation under the RRTA. *Id.* By the same reasoning, a payment to satisfy a FELA judgment is likewise not taxable under the RRTA.

In fact, the IRS appears to have arrived at its current position only in 2013, when the government filed amicus briefs in support of the railroad in *Heckman v. BNSF Ry. Co.*, 837 N.W. 2d 532 (Neb. 2013) and in *Mickey v. BNSF Ry. Co.*, No. ED98647, 2013 WL 2489832 (Mo. Ct. App. June 11, 2013), arguing in favor of imposing railroad retirement taxes on FELA awards for lost income.

In these circumstances, the IRS view warrants no deference.

D. To the Extent the RRTA Definition of Compensation is Ambiguous, this Court Should Construe the Provision in Respondent's Favor.

If this Court should determine that the RRTA definition of "compensation" is ambiguous with respect to the taxability of FELA awards, this Court should look to "the traditional canon that construes revenue-raising laws against their drafter." *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (U.S. 2001) (Thomas, J., concurring). *See also Hassett v. Welch*, 303 U.S. 303, 314 (1938) (ambiguity in the meaning of a revenue-raising statute should be resolved in favor of the taxpayer); *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927) ("The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."); *United States v. Merriam*, 263 U.S. 179, 188 (1923) ("If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.").

It is also well-settled that "the courts have been liberal in construing Congressional enactments intended to give tax relief to injured or sick employees." *Andress v. United States*, 198 F. Supp. 371, 376 (N.D. Ohio 1961) (internal quote omitted) (construing exclusion of wage continuation payments under then-existing 26 U.S.C. §105(d)). Applying that rule of construction in this case, this Court should uphold the ruling by the Eighth Circuit that Michael Loos's FELA award for past lost income is not taxable compensation under the RRTA.

II. DAMAGES AWARDED IN FELA ACTIONS ON ACCOUNT OF PHYSICAL INJURY ARE NOT "INCOME" AND THEREFORE NOT SUBJECT TO EMPLOYMENT TAXES, INCLUDING RAILROAD RETIREMENT TAXES.

With due respect to Albert Einstein,[4] the tax question in this case may be answered directly and fairly easily with the words Congress used in defining the scope of "gross income." The district court below held that because Congress has excluded Loos's award for lost wages from gross income, the award cannot be viewed as "compensation" subject to RRTA taxation: "[W]hen an award is received for a personal injury in a tort or tort-type proceeding, the whole award is excludable from income under 26 U.S.C. § 104(a), even if included in the award is an amount for lost earnings." Pet. 30a (quoting *Cowden v. BNSF Ry. Co.*, No. 4:08CV01534, 2014 WL 3096867, at *11 (E.D. Mo. July 7, 2014)).

A. The plain text of both 26 U.S.C. § 104(a)(2) and 26 U.S.C. § 3201, read together, support the exclusion of awards for lost wages from both federal income tax and federal employment taxes, including RRTA taxes.

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[4] "The hardest thing in the world to understand is the income tax." The Macmillan Book of Business and Economic Quotations 195 (Michael Jackman ed. 1984).

When Congress declared that "gross income means all income from whatever source derived,"[5] it cast a very wide net. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429-30 (1955). Indeed, this Court has stated that by use of that phrase Congress intended "to use the full measure of its taxing power." *Helvering v. Clifford*, 309 U.S. 331, 334 (1940). But Congress also expressly excluded specified items from that definition, including tort damages received "on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2).[6]

This Court has further instructed that "recovery for lost wages is also excludable as being 'on account of personal injuries,' as long as the lost wages

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[5] "General definition.--*Except as otherwise provided* in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

> (1) *Compensation for services*, including fees, commissions, fringe benefits, and similar items; . . ."

26 U.S.C.A. § 61(a)

[6] "(a) In general . . . gross income does not include-- . . .

> (2) . . . any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness; . . ."

26 U.S.C. § 104(a)(2). To be excludable under this section, payment must be received "through the prosecution of an action or the settlement entered into in lieu of prosecution of an action based upon tort or tort-type rights." *Pipitone v. United States*, 180 F.3d 859, 862 (7th Cir. 1999).

resulted from time in which the taxpayer was out of work as a result of her injuries." *Comm'r v. Schleier*, 515 U.S. 323, 329 (1995). There is no question that Michael Loos's personal injury award, including the $30,000 awarded for past lost wages, is excluded from the definition of "gross income" for federal income tax purposes. AAJ submits that amounts which are not income for purposes of income tax are also not taxable income for purposes of federal employment taxes, including RRTA taxes.

Petitioner and the United States argue to this Court that this exclusion from "income" under § 104(a)(2) is irrelevant to this case because "the RRTA tax is imposed on 'compensation'—a defined term in the RRTA." Pet. Br. 12. *See also id.* at 39 ("Rather than relying upon 'gross income,' the RRTA and RRA use the term 'compensation.'"); U.S. Br. 2 ("[T]o fund the retirement benefits, the RRTA imposes a tax on railroad workers' 'compensation.'"); *id.* at 31 ("The RRTA taxes 'compensation.'"). Amicus AAR similarly asserts, "The RRTA imposes separate payroll taxes on 'compensation' paid by railroad employers and received by railroad employees." AAR Br. 8 (citing 26 U.S.C. §3201(a) & (b)).

To the contrary, under the RRTA, both Tier 1 and Tier 2 taxes are "*imposed on the income* of each employee." 26 U.S.C. § 3201(a) & (b) (emphasis added).[7] As this Court recently observed, "Congress

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[7] (a) Tier 1 tax.--In addition to other taxes, there is hereby *imposed on the income* of each employee a tax equal to the applicable percentage

adopted the Railroad Retirement Tax Act of 1937. . . . Under the law's terms, private railroads and their employees pay a tax based on employees' *incomes*. *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2068 (2018) (emphasis added). The fact that the tax is measured as a percentage of the employee's compensation, 26 U.S.C. § 3201, and collected by "deducting the amount of the taxes from the compensation of the employee," 26 U.S.C. § 3202(a), does not alter the fact that the railroad retirement taxes, like the federal income tax itself, is imposed on the taxpayer's income.

The personal-injury exclusion currently found at 26 U.S.C. § 104(a)(2) dates back to § 213(b)(6) of the Revenue Act of 1918. *See* 40 Stat. 1057, 1066 (1919). Congress has revisited and amended § 104(a)(2) several times in recent decades. Congress

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> of the compensation received during any calendar year by such employee for services rendered by such employee. . . .
>
> (b) Tier 2 tax.--In addition to other taxes, there is hereby *imposed on the income* of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.

26 U.S.C.A. § 3201 (emphasis added). Significantly, these subsections make clear that the tax is equal to a percentage of compensation received by the employee "for services rendered." The IRS regulation similarly provides, the RRTA "tax is measured by the amount of compensation received *for services rendered* as an employee. 26 C.F.R. § 31.3201-1 (emphasis added).

amended the section in 1983 to include periodic payment settlements. Pub. L. No. 97-473, 96 Stat. 2605, § 1605(b). In 1989, Congress limited the excludability of punitive damages. Pub. L. No. 101-239, 103 Stat. 2106, § 7641(a). Further amendments in 1996 removed punitive damages from the exclusion entirely, added the requirement that injuries or sickness be "physical," and provided that emotional distress shall not be treated as a physical injury or physical sickness. Pub. L. No. 104-188, 110 Stat. 1755, § 1605(a) & (b). Yet, Congress has not countermanded the judicial construction of § 104(a)(2) as encompassing damages for lost wages on account of personal physical injury.

The argument advanced by the United States, that "statutory carve-outs from 'gross income' under the income-tax laws . . . are irrelevant under the RRTA," U.S. Br. 31, violates the plain meaning of the statutory text. "Income" is undeniably a broader term than "compensation." Section 61(a) of the Internal Revenue Code explicitly provides that compensation is a subcategory of income, *see* footnote 6. Moreover, this Court has described "income" in §61(a) as encompassing the broadest possible reach of Congress's taxing power. *Helvering*, 309 U.S. 331. The IRS itself has indicated that § 104(a)(2) is highly relevant to RRTA taxability. In 1996, after Congress amended § 104(a)(2) to exclude only damages received on account of personal *physical* injuries, the IRS issued a revenue ruling stating that back-pay damages received in an employment discrimination suit were no longer excludable from gross income un-

der § 104(a)(2) and therefore qualified as compensation for Railroad Retirement Tax purposes. Rev. Rul. 96-65, 1996-2 C.B. 6 (1996). This ruling suggests that the IRS understands compensation is a subset of income and that §104(a)(2) applies to RRTA taxes imposed on income.

Petitioner and the government ask this Court to hold for the first time that Congress intended different meanings for the basic term "income" in various portions of the Internal Revenue Code. And Congress did so, they contend, without leaving behind the least hint for taxpayers in the hearings, legislative reports or commentary.

Petitioner's statutory construction is rendered even more improbable by its insistence that RRTA taxation of FELA awards for lost wages has actually been the correct interpretation since the enactment of the RRTA in 1937. Pet. Br. 39-41; U.S. Br. 30-31.

As AAR indicates, each year sees thousands of potential FELA personal injury claims that include claims for loss of income. *See* AAR. Br. 5-6 (noting "an annual average of 2,983 on-duty injuries resulting in time away from the job"). Yet, for approximately 75 years following the enactment of the RRTA, "the question of whether railroad employers could withhold payroll taxes from awards to injured workers did not appear in court decisions prior to the 2012 decision." Thomas R. Ireland, *A New Class of Hybrid-Tort Actions Based on Recent FELA Deci-*

sions, 21 J. Legal Econ. 67, 68-69 (2014) (citing *Windom v. Norfolk Southern Railway Co.*, No. 5:10-CV-407, 2012 WL 6096990 (M.D. Ga. Dec. 7, 2012)). In *Windom*, the court rejected Norfolk Southern's argument that FELA awards were subject to retirement taxes.[8] *See also* Declaration of Michael P. McReynolds, JA27a ("In the hundreds of cases I have been involved with, BNSF and other railroads agreed that FELA verdicts and settlements, were not taxable under the Internal Revenue regulations and the Railroad Retirement Tax Act.").

Petitioner asks this Court to assume that Congress intended to subject FELA lost income awards to RRTA taxes. The more sensible interpretation is that Congress intended "income" to have the same meaning, including exclusion for amounts received on account of personal injury, for both the income tax and the railroad retirement tax.

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[8] In *Norfolk & W. Ry. Co. v. Chittum*, 468 S.E.2d 877, 882 (Va. 1996), the railroad raised the distinct but similar argument that in calculating the FELA plaintiff's lost wages the trial court should have subtracted his Tier 1 and Tier 2 retirement payments. The court rejected the argument, stating, "N & W has not cited, and we have not found, a single FELA decision from either a federal or a state court holding that such retirement payments should be deducted from gross income in calculating net income." *Id.* at 882.

B. Exclusion of awards for lost income from both federal income tax and federal employment taxes, including the RRTA, supports the policy underlying § 104(a)(2).

The modern rationale for the exclusion from income of amounts received on account of personal injury is based on "Congress' sympathy for the victims of personal injuries." *Dotson v. United States*, 87 F.3d 682, 687 (5th Cir. 1996). Justice Black, writing for the Court in *Haynes v. United States* explained that, in keeping the exclusion, Congress undoubtedly "intended to relieve a taxpayer who has the misfortune to become ill or injured, of the necessity of paying income tax" on payments received on account of those harms. 353 U.S. 81, 84-85 n.3 (1957) (quoting *Epmeier v. United States*, 199 F.2d 508, 511 (7th Cir. 1952)).

Congress clearly recognized that a "societal purpose would be served by benefiting innocent victims of tortious conduct." *Huddell v. Levin*, 395 F. Supp. 64, 87 (D.N.J. 1975), vacated on other grounds, 537 F.2d 726 (3d Cir. 1976). Lawmakers therefore made "a considered decision" that "damages recoverable for loss of earnings [be] expressly excluded from gross income." *Id.* at 88 n.33 (internal quotation omitted). Consequently, courts widely view the provision as expressing the "clear intent on the part of Congress to confer a benefit upon an injured party by making his recovery tax-free." *Louissaint v. Hudson Waterways Corp.*, 443 N.Y.S.2d 678, 682 (N.Y. Sup. Ct. 1981). *See also Roemer v. Comm'r*,

716 F.2d 693, 696 n.2 (9th Cir. 1983) (the § 104(a)(2) exclusion reflects the "compassion" of Congress); *Hall v. Chicago & Nw. Ry. Co.*, 125 N.E.2d 77, 86 (Ill. 1955) (the provision reflects congressional intent "to give an injured party a tax benefit").

For this reason, while "it is generally true that statutes allowing deductions from gross income are strictly construed," courts "have been liberal in construing Congressional enactments intended to give tax relief to injured or sick employees." *Andress v. United States*, 198 F. Supp. 371, 376 (N.D. Ohio 1961) (internal quotation omitted).

C. The Non-Taxability of Plaintiff's Award for Lost Income on Account of Personal Injury under the RRTA Is Consistent with the Non-Tax Treatment of Personal Injury Awards Under FICA Employment Taxes.

It is well-settled that personal injury awards that are excluded from income for income tax purposes by § 104(a)(2) are also excluded from federal employment taxation for Social Security purposes.

This Court in *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), set forth the basic principle that Congress intended "wages" to have the same meaning for income tax and employment tax withholding. The taxpayer-employer in that case provided meals and lodging for its workers on oil rigs. The IRS acknowledged that these expenditures were excluded from the workers' income

and thus were not wages subject to income tax withholding under I.R.C. § 3402(a). *See Rowan*, 452 U.S. at 250-51. However, IRS regulations categorized the meals and lodging as "wages" for purposes of FICA employment tax withholding. *Id.* at 252. Justice Powell, writing for the Court, stated:

> Congress intended . . . to coordinate the income-tax withholding system with FICA and . . . did so to promote simplicity and ease of administration. Contradictory interpretations of substantially identical definitions do not serve that interest. It would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently.

Id. at 257. In addition, the Court held that the "plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner for FICA . . . as for income-tax withholding." *Id.* at 263. The treasury regulations, which employed multiple definitions of "wages," undermined the congressional aims of "simplicity and ease of administration" and were therefore invalid. *Id.*

Relying on *Rowan*, every federal circuit court of appeals to address the issue has held that personal injury damages that are excluded from gross income under § 104(a)(2) are also not subject to FICA payroll taxes. In *Dotson v. United States*, 87 F.3d

682, 689 (5th Cir. 1996), the Fifth Circuit held, on the basis of *Rowan*, that the "portion of the [personal injury] settlement determined to be excludable from taxable income on remand to the district court should also be excludable from wage taxes." *See also Gerbec v. United States*, 164 F.3d 1015, 1025-26 (6th Cir.1999) (similar); *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991) (age discrimination damages that were excludable from income under the then-existing § 104(a)(2) "are simply not 'income' as used in the FICA statutes.").

This Court recently reaffirmed *Rowan* in *United States v. Quality Stores, Inc.*, 572 U.S. 141 (2014). That case did not involve personal injury awards, but rather FICA withholding on supplemental unemployment compensation benefits. Justice Kennedy, writing for the Court, emphasized, "What is of importance is the major principle recognized in *Rowan*: that simplicity of administration and consistency of statutory interpretation instruct that the meaning of 'wages' should be in general the same for income-tax withholding and for FICA calculations." *Id.* at 155. This same major principle compels the conclusion in this case that the meaning of "income" should be the same for the purposes of federal income tax withholding and for federal employment taxes, which include RRTA taxes.

Petitioner in fact concedes that "FICA does not tax an award for time lost due to personal injury." Pet. Br. 47 (quoting *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 30 (Pa. Super. 2016)). *See also* AAR Br. 17 (similar). The IRS as well agrees

that "payments on account of personal injury are not taxable under FICA." U.S. Br 32.[9] *See* Office of Chief Counsel, IRS Memo., *Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements*, p.8 (Oct. 22, 2008), www.irs.gov/pub/lanoa/pmta2009-035.pdf. ("If not income, then not wages. Amounts excludable from gross income under §104(a)(2) . . . are not wages for FICA and income tax withholding purposes."). More recently, the IRS issued a private letter ruling that wage continuation payments to police and firefighters for injuries in the course of employment were excluded from gross income under §104(a)(1) and therefore are not subject to withholding for both federal income tax and FICA tax. IRS, Priv. Ltr. Rul. 2012-10-012, 2012 WL 756551 (Mar. 9, 2012).

There is no sound basis for defining an award for lost wages as not income for federal income tax purposes and not taxable for FICA purposes, but taxable income for purposes of the RRTA. Treasury regulations provide that the term "compensation" for purposes of the RRTA has the same meaning as

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[9] The government's current view is that the decisions in *Gerbec*, *Redfield* and *Dotson*, as well as its own prior view in this case, that receipts excluded from income tax under § 104(a)(2) are also excluded from FICA taxes, are erroneous. U.S. Br. 32. The government's new position not only upends the settled expectations of perhaps thousands of successful FELA claimants, but of perhaps hundreds of thousands of plaintiffs who receive verdicts or settlements of tort causes of action for personal injury. It should go without saying that such an unexpected reversal of settled law amounts to a substantial tax increase that is the sole responsibility of the legislative branch.

the term "wages" in FICA." 26 C.F.R. § 31.3231(e)-1(a)(1).

The majority of courts to have addressed this issue have arrived at the similar conclusion that FELA awards for lost wages are not subject to RRTA tax and withholding because they are excluded from "income" by § 104(a)(2). As the Supreme Court of Missouri stated,

> "[C]ompensation" received as a part of a personal injury judgment is not subject to RRTA withholding taxes for the same reason that lost wages received as part of a personal injury judgment are not subject to FICA withholding taxes. . . . [A] payment that does not qualify as income [under § 104(a)(2)] cannot qualify as wages.").

Mickey v. BNSF Ry. Co., 437 S.W.3d 207, 212 (Mo. 2014) (en banc), *See also Loy v. Norfolk S. Ry. Co.*, No. 3:12-CV-96, 2016 WL 1425952, at *5 (N.D. Ind. Apr. 12, 2016) ("Loy's entire jury award is based on his physical injury and is excludable from RRTA withholdings under § 104(a)(2)."); *Marlin v. BNSF Railway Co.*, 163 F. Supp. 3d 576, 582 (S.D. Iowa 2016) (because wages are a subset of income, plaintiff's jury award "is excludable from RRTA withholdings under § 104(a)(2)."); *Cowden*, 2014 WL 3096867, at *12 (Award in a FELA action "is excluded from 'income' in whole under 26 U.S.C. § 104(a)(2)" and therefore is not subject to RRTA withholding.); *Cf. Munoz v. Norfolk S. Ry. Co.*, 2018 IL

App (1st) 171009, 2018 WL 2728696, at *7 (Ill. App. Ct. June 5, 2018) (holding "Munoz's FELA award is not subject to withholding under the RRTA" but not reaching its excludability under § 104(a)(2)).

Three decisions have held to the contrary. The courts in *Phillips v. Chicago Cent. & Pac. R.R. Co.*, 853 N.W.2d 636, 652 (Iowa 2014) and *Heckman v. BNSF Ry. Co.*, 837 N.W.2d 532, 543 (Neb. 2013), held that FELA awards may be classified as "compensation" and subject to RRTA taxes. Neither court considered whether such awards were nonetheless not taxable because not income under § 104(a)(2). The superior court in *Liberatore v. Monongahela Ry. Co.*, No. 1011-EDA-2015, 2016 WL 1381861, at *12 (Pa. Super. Ct. Apr. 7, 2016) held that the plaintiff's award was subject to RRTA taxes despite § 104(a)(2).

AAJ submits that the reasoning followed by the majority of courts is based on both reasoned statutory construction and sound policy.

III. PERMITTING RAILROADS TO WITHHOLD RRTA TAXES ON FELA AWARDS FOR LOST WAGES WILL IMPEDE FAIR SETTLEMENTS OF FELA CLAIMS.

A. Congress Intended FELA to Provide Fair Compensation to Injured Workers and Financial Incentive for Railroads to Invest in Workplace Safety.

Railroading has always been dangerous. "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001). The rates of death and serious injury to railroad workers were "astronomical." Every year, one in every 300 railroad workers was killed on the job. Walter Licht, *Working For The Railroad: The Organization of Work in the Nineteenth Century*, 124-29 (1983). In 1908 alone, 281,645 railroad workers were injured or killed on the job. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011).

In that year, Congress enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, to give railroad workers a statutory negligence cause of action for personal injury with the right to a jury trial. Congress took this step firmly convinced that the "only manner in which [railroads] can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care." 40 Cong. Rec. 4605 (1906). *See also McBride*, 564 U.S. at 690-93; *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994).

These days railroading is far safer, but workers still face dangerous conditions. There continue to be collisions and derailments. Workers continue to suffer serious injury from rolling railcars and moving machinery in the train yards. Asbestos and toxic

solvents cause deadly harm to repair and maintenance workers. Brakemen suffer disabling knee and back injuries caused by years of walking track beds filled with uneven ballast. This Court has recognized its duty to preserve the statutory cause of action Congress has created. *Gottshall*, 512 U.S. at 543 ("We have liberally construed FELA to further Congress' remedial goal.").

Reversal in this case, and this Court's holding that FELA awards for lost income are subject to withholding of railroad retirement taxes, will diminish the compensation FELA claimants can recover. However, what also causes concern among trial lawyers who represent injured rail employees and their families is the railroads' hidden purpose in this and other cases. A defendant found liable in a FELA case is not immediately advantaged by a ruling that it may subtract from the judgment the amount of RRTA taxes plaintiff would have owed on the wages he lost. Any such amount withheld by the railroad must be submitted to the IRS, along with the somewhat larger amount the railroad would have owed as its share. 26 U.S.C. §3202(a); 26 C.F.R. §31.3202-1(a). *See* Pet. Br. 11 (discussing amounts paid to the IRS by Petitioner in this case). What concerns trial lawyers is that railroad defendants will weaponize the rule for use in settlement negotiations.

Amicus AAR argues that taxation of such awards is required to assure stable funding for retirement benefits paid out to railroad workers. Petitioner asserts that the "nation's railroads have a long-term interest in the stability and adequate

funding of the rail retirement system." Pet. Br. 1. Petitioner asserts that the non-taxability of FELA lost income awards results in a railroad retirement system that "is asymmetrical and inherently unstable." *Id.* The AAR cautions that the non-taxability rule has "grave implications for the railroad retirement system." AAR Br. 10. Ultimately, AAR warns, "additional funding will be required to keep the systems in financial balance." *Id.* at 21.

There is no indication that non-taxation of FELA awards, which has been the prevailing rule, has undermined that system. The Board's latest report indicates that Tier 1 and Tier 2 taxes totaled $5.9 billion in FY 2016. United States Railroad Retirement Board, *2017 Annual Report*, 7 (2017), *available at* https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf.

Since 2002, funds not needed immediately for benefit payments or administrative expenses have been invested by an independent National Railroad Retirement Investment Trust. The latest report by the RRB notes that as of September 30, 2016, the net asset value of trust-managed assets was $25.1 billion, an increase of more than $500 million over the previous year. *Id.* at 14. Again, the decision to increase RRTA taxes is reserved exclusively to Congress.

More to the point, in the real world of FELA settlement negotiations, the taxability rule threatens both to undercompensate injured plaintiffs and

to deprive the railroad retirement system of Tier 1 and Tier 2 taxes.

B. RRTA Taxation of FELA Awards Will Impede Fair Settlement Negotiations and Reduce Funding for Railroad Retirement Benefits.

The rule Petitioner and supporting amici seek will arm railroads with a potent weapon for use in settlement negotiations with injured workers. Under such a rule, the portion of a damage award designated as past lost wages would be subject to RRTA taxes, which the defendant would deduct from payment in satisfaction of the judgment. If the jury does not designate the portion of the award that is for lost wages, under Petitioner's rule, the entire award would be subject to RRTA taxes. *E.g.*, *Phillips*, 853 N.W.2d at 645 ("we hold the entire amount of the [general] verdict in this case should be considered payment for time lost"); *Heckman*, 837 N.W.2d at 539 (similar).

Most claims, however, end in settlement. In that instance, the parties can agree on how much of the settlement, if any, is allocated to lost past income. "Where there is an express allocation in the settlement agreement between the parties, it will generally be followed in determining the allocation for Federal income tax purposes." *Healthpoint, Ltd. v. C.I.R.*, 102 T.C.M. (CCH) 379, 2011 WL 4550112, at *4 (T.C. 2011).

Under the rule sought by Petitioner, the railroad can use the prospect of RRTA tax liability to pressure the plaintiff into foregoing a jury trial and agreeing to accept a lower settlement offer. If the plaintiff is willing to accept a lower settlement, the railroad may agree to designate only a small amount of the settlement as payment for past lost wages, reducing or eliminating the tax liability. Indeed, this is the settlement tactic complained of by plaintiff's counsel but implicitly approved by the court in *Liberatore*, 140 A.3d at 31-32. As described by a forensic economist who has testified for both plaintiffs and defendants in FELA cases, "[i]n the poker game of the settlement process," the RRTA taxability rule ensures that "the railroad holds the best hand." Ireland, *supra*, at 78. The author further suggests that the rule also enables the railroad to threaten an injured worker's disability payments. *Id.* at 77-78.

Importantly, to the extent that plaintiffs accept lower settlement offers with little or no amounts allocated to lost wages, the railroad retirement system will receive little or no tax revenue from such settlements. The rule invites the railroad to offer a settlement under which neither the plaintiff's share nor the railroad's share of RRTA taxes will be remitted to the IRS. Moreover, the parties may enter into a settlement even after a jury verdict. Ireland, *supra*, at 78. Despite the expressed concerns by Petitioner and the AAR regarding the stability of future funding of retirement benefits for railroad workers, the tax rule's primary outcome will be to

enable negligent railroads to extract lower settlements from FELA claimants while adding no RRTA taxes to the retirement system.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the decision of the Eighth Circuit Court of Appeals to deny BNSF's Motion for Collateral Source Offsets for railroad retirement taxes.

Respectfully submitted,

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No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
TIME-LOST FELA PAYMENTS ARE COMPENSATION UNDER THE RRTA AND ARE SUBJECT TO RRTA PAYROLL TAXES	4
A. Railroad Workers Who Are Injured on the Job May Collect Damages for Lost Wages Under the Federal Employers' Liability Act	5
B. Railroad Employees are Eligible for Railroad Retirement Benefits Which are Funded by Payroll Taxes Levied on Their Compensation Under the RRTA	7
C. The Court Below Was Wrong When it Held That FELA Time-Lost Awards Are Not Subject to RRTA Taxes, as Were Other Lower Courts Which Reached the Same Result Using A Different Rationale	9
D. Railroad Employees' RRA Benefits are Enhanced By Their Receipt of Pay for Time Lost and Therefore Railroad Retirement Taxes Must Be Paid on Time-Lost Awards	13
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page(s)

Cowden v. BNSF Ry. Co.,
2014 U.S. Dist. LEXIS 91454
(E.D. Mo. 2014) 11, 12, 19

DeBiasio v. Illinois Cent. R.R.,
52 F.3d 678 (7th Cir. 1995)..... 6

Florida E. Coast Ry. Co. v. United States,
470 F.2d 513 (Ct. Cl. 1972)..... 14

Frazier v. Norfolk & W. Ry. Co.,
996 F.2d 922 (7th Cir. 1993)..... 5, 6

Galveston By Bd. of Trustees v. United States,
22 Cl. Ct. 600 (Cl. Ct. 1991)..... 14

Green v. Denver & Rio Grande W. R.R.,
59 F.3d 1029 (10th Cir. 1995)..... 8

Hance v. Norfolk S. Ry Co.,
571 F.3d 511 (6th Cir. 2009)..... 18

Heckman v. Burlington N. Santa Fe Ry. Co.,
837 N.W.2d 532 (Neb. 2013)..... 13

Hisquardo v. Hisquardo,
439 U.S. 572 (1979)..... 18

Jacques v. R.R. Retirement Bd.,
736 F.2d 34 (2d Cir. 1984)..... 16

Liberatore v. Monongahela Ry. Co.,
140 A.3d 16 (Pa. Super 2016)..... 13, 16, 17

Loy v. Norfolk S. Ry. Co.,
2016 U.S. Dist. LEXIS 48824
(N.D. Ind. 2016) 11, 12

Marlin v. BNSF Ry. Co.,
163 F.Supp.3d 576 (S.D. Iowa 2016)..... 11, 12

TABLE OF AUTHORITIES—Continued

Page(s)

Mickey v. BNSF Ry. Co.,
437 S.W.3d 207 (Mo. 2014) 12, 17, 19

Munoz v. Norfolk S. Ry. Co.,
2018 Il. App. (1st) 171009
(Ill. App. 2018) 12

New Orleans & N. E. R.R.,
247 U.S. 367 (1916) 5

Norfolk S. Ry. Co. v. Williams,
2018 Ala. Civ. App. LEXIS 101
(Ala. Civ. App. 2018) 13, 17

Norton v. R.R. Retirement Bd.,
69 F.3d 282 (8th Cir. 1995) 18

Phillips v. Chicago Cent. & Pac. R.R.,
853 N.W.2d 636 (Iowa 2014) 13

Redfield v. Insur. Co. of N. Am.,
940 F.2d 542 (9th Cir. 1991) 12

Sloas v. CSX Transp., Inc.,
616 F.3d 380 (4th Cir. 2010) 8

Standard Office Bldg. Corp., v. United States,
819 F.2d 1371 (7th Cir. 1987) 12, 14

State of Calif. v. Cent. Pac. R.R.,
127 U.S. 1 (1888) 6

Southern Ry. v. Gray,
241 U.S. 333 (1916) 5

STATUTES

26 U.S.C. §74(c) 20

26 U.S.C. §104 ..... 13, 20

TABLE OF AUTHORITIES—Continued

	Page(s)
26 U.S.C. §104(a)(2)	12, 19, 20
26 U.S.C. §106(b)	20
26 U.S.C. §106(d)	20
26 U.S.C. §108(f)(4)	20
26 U.S.C. §117	20
26 U.S.C. §119	20
26 U.S.C. §127	20
26 U.S.C. §132	20
26 U.S.C. §422(b)	20
26 U.S.C. §423(b)	20
26 U.S.C. §§3101 *et seq.*	12
26 U.S.C. §§3201-3241	1
26 U.S.C. §3201(a) & (b)	8
26 U.S.C. §3202(a)	9
26 U.S.C. §3202(b)	9
26 U.S.C. §3221(a) & (b)	8
26 U.S.C. §3231(e)(1)	9, 15
26 U.S.C. §3231(e)(5)	20
26 U.S.C. §3231(e)(6)	20
26 U.S.C. §3231(e)(9)	20
26 U.S.C. §3231(e)(10)	20
26 U.S.C. §3231(e)(11)	20
26 U.S.C. §3231(e)(12)	20

TABLE OF AUTHORITIES—Continued

	Page(s)
42 U.S.C. §410(a)(9)	7
45 U.S.C. §§51-60	1
45 U.S.C. §51	5
45 U.S.C. §56	5
45 U.S.C. §§231–231v	1
45 U.S.C. §231(f)(1)	15
45 U.S.C. §231(h)(1) & (2)	15
45 U.S.C. §231a(a)(1)	15
45 U.S.C. §231a(a)(1)(ii)	8
45 U.S.C. §231a(a)(1)(iv)	8
45 U.S. C. §231a(b)	15
45 U.S.C. §231f	2
46 U.S.C. §30104	5
Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970)	6
Interstate Commerce Act of 1887, c.104, 24 Stat. 379	6
Railway Labor Act, c. 347, 44 Stat. 577 (1926)	6
Safety Appliances Act of 1893, c. 196, 27 Stat. 531	6
REGULATIONS AND ADMINISTRATIVE MATERIALS	
20 C.F.R. §210.5(d)	15

TABLE OF AUTHORITIES—Continued

Page(s)

20 C.F.R. §211.1 15

20 C.F.R. §211.2(b)(2) 15

20 C.F.R. §211.3(a) 15

26 C.F.R. §31.3202-1(a) 9

26 C.F.R. §31.3202-1(e) 9

26 C.F.R. §31.3231(e)-1(a)(3)-(4) 10, 15

IRS Rev. Rul. 61-1, 1961-1-C.B. 14, 1961 WL 12630 (1961) 18

IRS Rev. Rul. 85-97, 1985-2. C.B. 50, 1985 WL 287177 (1985) 19

IRS, Technical Advice Memorandum 8115012, 1980 WL 137627 (1980) 19

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Gen. Accounting Office, *Federal Employers' Liability Act: Issues Associated with Changing How Railroad Work-Related Injuries Are Compensated* (1996) 5

R.R. Ret. Bd., *2017 Annual Report* 8

R.R. Ret. Bd., *Pay for Time Lost from Regular Railroad Employment*, Form 1B-4, (06-95) 10, 16

R.R. Ret. Bd., *Railroad Retirement Handbook* (2015) 7, 8, 9, 15

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR seeks to participate as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.

AAR is participating in this case as *amicus curiae* because it involves two federal statutes that apply uniquely to the railroad industry: the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60 and the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241. These statutes affect all railroads, and involve the expenditure of significant sums of money: the payment of hundreds of millions of dollars in settlements and verdicts under FELA, and the payment of billions of dollars in taxes under the RRTA, which fund billions of dollars in benefits provided under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v.

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[1] Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

AAR works closely with its members to ensure consistent and correct application of FELA around the country. Similarly, AAR works with its members and the Railroad Retirement Board (RRB)—an independent agency in the executive branch of the federal government charged with administering the RRA, 45 U.S.C. §231f—to ensure that the railroad retirement system is administered in an equitable and efficient manner, and in accordance with the requirements of the law.

SUMMARY OF THE ARGUMENT

The Eighth Circuit's decision, which held that FELA awards for lost wages are not subject to RRTA payroll taxes, should be reversed. Railroad employees who are injured on the job may bring negligence suits against their employing railroad under FELA. Lost wages often make up a significant portion of the damages sought and recovered in those suits.

Railroad employees are also covered by a unique retirement system under which they become eligible for retirement, disability and other benefits based on their years of service and creditable compensation. The railroad retirement system is comparable to the Social Security system in some ways, but differs in others. RRA benefits are funded by payroll taxes levied under the RRTA on the compensation received by employees and paid by employers, which employers must collect and pay to the IRS.

The Eighth Circuit held that damages for lost wages (so-called "time-lost" awards) are not taxable because they do not meet the definition of compensation under the RRTA. Compensation is defined as "any form of money remuneration paid to an individual for services rendered as an employee to one of more employers."

The Court held that such awards are not taxable because they are not made for "services rendered," but instead are compensation for periods of time when "the employee did not actually render any services." This unduly restrictive reading of the term "compensation" would call into question not just the taxability of time-lost awards, but also the taxability of other payments made to employees for periods when they do not actually perform services, such as vacation and sick pay. Virtually every other lower court that has addressed this issue has rejected this interpretation of RRTA compensation.

However, a number of those courts have held that even though time-lost awards are compensation, they are not taxable under the RRTA because personal injury damages are excluded from gross income under section 104 of the Internal Revenue Code. Those courts have reasoned that compensation is a subset of gross income, and if time-lost awards are not gross income they necessarily cannot be compensation. As did the Eighth Circuit, those courts also have misread the law and failed to account for the close connection between "compensation" under the RRA and "compensation" under the RRTA.

A proper reading of the RRTA—which takes into account the purpose of RRTA payroll taxes—requires that FELA time-lost awards be subject to RRTA taxes. The railroad retirement system is an integrated statutory scheme under which benefits paid under the RRA are funded by taxes levied under the RRTA. Both eligibility for, and the level of, benefits payable to a retired railroad employee under the RRA are based on the employee's years of services and the amount of compensation with which the employee is credited. For the purpose of calculating the benefits for which

a railroad worker will become eligible, payments received for time lost (including pay received due to a personal injury) are considered compensation and included in determining both the employee's "years of service" and creditable compensation. As a result, when a FELA award for lost wages is made, and treated as a payment for time lost under the RRA, the employee realizes a distinct benefit because such treatment serves to increase the employee's years of service and creditable compensation. Because railroad employees receive RRA credit for the time-lost FELA awards they receive, those awards must be treated as compensation that is subject to the payroll taxes that support those RRA benefits.

ARGUMENT

TIME-LOST FELA PAYMENTS ARE COMPENSATION UNDER THE RRTA AND ARE SUBJECT TO RRTA PAYROLL TAXES.

This case concerns the interplay between two federal statutes that are unique to the railroad industry: FELA and the RRTA. FELA is a federal negligence law that provides compensation to employees who are injured on the job. The RRTA levies taxes that fund benefits under the RRA, a statute which created and governs the railroad retirement system. The court below held that payments made to railroad employees under FELA for wages lost as a result of an injury—"time-lost" awards—are not subject to RRTA taxes. Not only is the ruling below based on an incorrect reading of the statute, it violates the Congressional design because it exempts time-lost awards from the taxes that are specifically earmarked to fund RRA pension benefits, even while the payment of such awards to employees serves to enhance the benefits those employees receive.

A. Railroad Workers Who Are Injured on the Job May Collect Damages for Lost Wages Under the Federal Employers' Liability Act.

FELA was enacted over a century ago, predating the modern no-fault workers' compensation laws which became universal for the rest of U.S. industry in the decades after FELA's enactment. *See* Gen. Accounting Office, *Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated* 15 (1996).[2] Congress incorporated into FELA the concept of common law negligence as the basis for recovery. 45 U.S.C. §51; *New Orleans & N. E. R.R.*, 247 U.S. 367, 371 (1916) ("negligence is essential to recovery"); *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916) (The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery.").

When a railroad employee is injured on the job, unless the parties can reach a settlement the employee must bring a lawsuit in state or federal court in order to recover. 45 U.S.C. §56 (granting state and federal courts concurrent jurisdiction in FELA cases). In these FELA lawsuits, injured workers may seek both economic and noneconomic damages. *See Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925 (7th Cir. 1993).

Damage claims for past and future lost wages often are a major component of a FELA suit. During the past three years, railroads reported to the Federal Railroad

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[2] The maritime industry, by virtue of the Jones Act, also is covered by the FELA. 46 U.S.C. §30104. Virtually all other employers and employees in the United States are covered by a state or federal no-fault workers' compensation law.

Administration an annual average of 2,983 on-duty injuries resulting in time away from the job. http://safetydata.fra.gov/OfficeofSafety/publicsite/Query/casemp.aspxQuery4.09WorkerSafetyReport. Not surprisingly, many of the hundreds of FELA suits filed against railroads each year seek recovery for wage loss incurred when the employee was unable to work due to the injury. Often such awards constitute a significant portion of the damages awarded. *See e.g., DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 687 (7th Cir. 1995) (plaintiff awarded $51,000 for past lost earnings and $1,150,000 for future lost earnings); *Frazier*, 996 F.2d at 925 (plaintiff awarded $2.3 million had sought $114,600 in past lost wages and $430,000 in future lost earnings).

FELA is but one example of how Congress historically has singled out railroads for unique treatment, motivated in part by the industry's outsized role in the national economy. *See State of Calif. v. Cent. Pac. R.R.*, 127 U.S. 1, 39-40 (1888) (describing efforts by Congress to promote expansion of the railroad industry as a means of promoting the country's economic development). Given the pervasive role railroads played in national commerce, Congress frequently focused first on railroads as it extended its authority over industry and the national economy. *E.g.*, Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (economic regulation); Safety Appliances Act of 1893, c. 196, 27 Stat. 531 (safety); Railway Labor Act, c. 347, 44 Stat. 577 (1926) (labor relations); Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970) (safety).

Today, railroads are just one of several transportation modes that play a major role in interstate, and international, commerce. However, in the areas of economic regulation, employer liability, safety, and

labor relations, railroads remain subject to unique statutory schemes that operate parallel to (though at times starkly differently from) the comparable laws that govern most other industries. When applying statutes to which railroads—and only railroads—are subject, courts must be mindful of the specific goals and purposes Congress intended to advance, and how Congress intended those laws to interrelate.

B. Railroad Employees are Eligible for Railroad Retirement Benefits Which are Funded by Payroll Taxes Levied on Their Compensation Under the RRTA.

As with compensation for work-related injuries, railroads and their employees are treated differently from other industries when it comes to retirement and related benefits. They are not covered by the Social Security system that covers virtually all other employers and employees (and self-employed individuals) in the United States. *See* 42 U.S.C. §410(a)(9) (excluding service performed by employees of carriers by railroad from the definition of service under the Social Security Act). Instead, they are covered by the RRA, a retirement security system that was enacted around the same time as Social Security. R.R. Ret. Bd., *Railroad Retirement Handbook* 1-2 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015%29.pdf.). The RRA provides retirement and disability benefits to railroad workers, their spouses and survivors.

The RRA provides two tiers of benefits: tier I benefits are comparable to the benefits provided under the Social Security system, but are based on railroad retirement age and service requirements; tier II provides additional retirement benefits, above and beyond what Social Security provides, that are comparable to

private multiemployer pension plans. Tier II also provides other benefits not available under Social Security. *See e.g.*, 45 U.S.C. §231a(a)(1)(iv) (providing an occupational disability benefit).[3] Eligibility requirements under the RRA differ from Social Security, and in some cases are more favorable to long–term railroad employees. *See e.g.*, 45 U.S.C. §231a(a)(1)(ii) (permitting workers aged 60 with at least 30 years of service to retire with an unreduced benefit). *See generally Railroad Retirement Handbook* at 15-20.

The substantial sums paid in railroad retirement benefits each year require a reliable funding source. At the end of fiscal 2016, 222,100 age and disability annuities, 145,900 spousal annuities, and 116,800 survivor annuities were being paid. R.R. Ret. Bd., *2017 Annual Report* at 4 (available at https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf). In fiscal year 2016, about $12.3 billion in retirement benefits were paid to those beneficiaries. *Id.* at 1, 15.

The "payroll taxes levied on covered employers and their employees" under the RRTA are the "primary source of income to the railroad retirement and survivor program." *2017 Annual Report,* at 7; *Railroad Retirement Handbook* at 45. The RRTA imposes separate payroll taxes on "compensation" paid by railroad employers and received by railroad employees to fund each tier of benefits. 26 U.S.C. §3201(a) & (b) (imposing tier I and tier II payroll tax on compensation received by employees); 26 U.S.C. §3221(a) & (b)

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[3] Some courts have permitted railroad employees to receive both unreduced FELA awards and occupational disability benefits for the same work-related injuries. *E.g., Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 392 (4th Cir. 2010); *Green v. Denver & Rio Grande W. R.R.*, 59 F.3d 1029, 1032-33 (10th Cir. 1995).

(imposing tier I and tier II payroll tax on compensation paid by employers). Compensation is defined as "any form of money remuneration paid to an individual for services rendered as an employee to one of more employers." 26 U.S.C. §3231(e)(1).

Tier I taxes are the equivalent of the Social Security payroll taxes and fund Social Security-equivalent benefits (as well as Medicare). Tier II payroll taxes fund the benefits that are available to railroad employees but not to Social Security beneficiaries. Tier II taxes have a different earnings base (the maximum amount of earnings that is subject to the tax each year) than tier I taxes, and utilize a different rate for employees and employers, which can fluctuate year to year based on the "average account benefit ratio"—a ratio of fund assets to benefits and expenses. *Railroad Retirement Handbook* at 46.

The RRTA requires that railroad employers collect the taxes owed by their employees by deducting the proper amounts from the employee's compensation and paying those amounts to the IRS. 26 U.S.C. §3202(a); 26 C.F.R. §31.3202-1(a). The law is clear that the employer has an absolute obligation to pay the taxes to the IRS and not to anyone else. 26 U.S.C. §3202(b); 26 C.F.R. §31.3202-1(e).

C. The Court Below Was Wrong When it Held That FELA Time-Lost Awards Are Not Subject to RRTA Taxes, as Were Other Lower Courts Which Reached the Same Result Using A Different Rationale.

Following the law, in the case below petitioner BNSF withheld, and paid to the IRS, an amount that covered respondent Loos' payroll tax obligation on the portion of his FELA verdict that was attributable to

time lost. Pet. Br. at 11. This was consistent with the long-standing views of both the RRB and the IRS. "All compensation under the Railroad Retirement Tax Act (RRTA) is subject to the Tier I and Tier II tax rates . . . This is also true of pay for time lost." R.R. Ret. Bd., *Pay for Time Lost from Regular Railroad Employment*, Form 1B-4, at 8 (06-95). The RRB explains that "[p]ay for time lost is compensation paid by a railroad employer which is creditable under the [RRA] and which is attributable to lost earnings for an identifiable period of absence from active service." *Id.* at 1. In addition, Treasury regulations interpret compensation under the RRTA to include time-lost payments. 26 C.F.R. §31.3231(e)-1(a)(3)-(4).[4] Thus, both the IRS and RRB take the position that time-lost payments constitute compensation for the purpose of both calculating benefits and levying taxes, and that railroads and their employees must pay RRTA payroll taxes on time-lost payments made to employees, including awards made under FELA.

The Eighth Circuit disagreed and held that RRTA taxes are not owed on time-lost payments. Pet. App. 1a – 24a. Reading the RRTA's definition of compensation narrowly, the court held that time-lost payments are not taxable because they are not made for "services rendered," but instead are compensation for periods of time when "the employee did not actually render any services." Pet App. 20a. This crabbed reading of the definition of compensation has grave implications for the railroad retirement system beyond the tax treatment of FELA time-lost awards. If FELA time-lost

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[4] The regulation states that "[t]he term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . . ."

awards are not subject to RRTA taxes because they are payments for time periods during which services were not actually rendered by the employee, there is no logical reason why other payments for time periods during which services are not rendered—like vacation, holiday, and sick pay—also would not be taxable. Under the rationale of the court below there is no way to distinguish those types of payments—also made for periods when an employee does "not actually render any services"—from time-lost awards. Thus, the decision below calls into question whether large sums of money regularly paid to railroad employees are subject to RRTA taxes. Many millions of dollars in payroll taxes, which heretofore have been levied without controversy, would be at stake. Wage-related data showing the magnitude of these payments provided to the Surface Transportation Board by railroads are available at https://www.stb.gov/econdata.nsf/dc81d49e325f550a852566210062addf?OpenView&Start==1& Count=300&Expand=1#1.

Other courts have reached the same outcome as the Eighth Circuit even while rejecting its reading of the definition of compensation under the RRTA. *See Cowden v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 91454, at *23 (E.D. Mo. 2014) ("[T]he Court finds an FELA award of lost pay falls within the definition of 'compensation' under the RRTA. Contrary to Plaintiff's arguments, Plaintiff's verdict is not excluded from the definition of 'compensation' under the RRTA merely because personal injury prevented Plaintiff from performing his job duties."); *Marlin v. BNSF Ry. Co.*, 163 F.Supp.3d 576, 579 (S.D. Iowa 2016) (agreeing with *Cowden* conclusion that FELA judgments for lost pay fall within the definition of compensation for RRTA purposes) *Loy v. Norfolk S. Ry. Co.*, 2016 U.S. Dist. LEXIS 48824 (N.D. Ind. 2016) (same). *See* Pet. Br. at

18-22, and n. 20 (explaining why the narrow definition of "compensation" adopted by the Eighth Circuit is incorrect and listing cases that have rejected that interpretation).[5]

However, those courts have offered an alternative, equally erroneous, rationale for holding that time-lost awards are not taxable under the RRTA. Despite concluding that FELA time-lost awards are compensation under the RRTA, they have held that such awards are not subject to RRTA taxes because they are excluded from gross income under 26 U.S.C. §104(a)(2) as "damages . . . received . . . on account of personal physical injuries." *Cowden*, 2014 U.S. Dist. LEXIS 91454, at *26-29; *Marlin*, 163 F.Supp.3d at 581-82; *Loy*, 2016 U.S. Dist. LEXIS 48824, at *11-14. The Missouri Supreme Court also concluded that FELA awards are not subject to RRTA payroll taxes because personal injury awards are not subject to federal income taxes pursuant to 26 U.S.C. §104(a)(2), nor to payroll taxes under the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*, the statute which funds Social Security benefits. *Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207, 211-12 (Mo. 2014).[6] But these courts also have misread the statute and upset the symmetry between the benefit and tax sides of the railroad retirement coin. *Standard Office Bldg. Corp., v. United States,* 819 F.2d 1371, 1373 (7th Cir. 1987) (The RRA

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[5] However, a recent Illinois appellate court adopted the reasoning of the court below. *Munoz v. Norfolk S. Ry. Co.*, 2018 Il. App. (1st) 171009 (Ill. App. 2018).

[6] *See Redfield v. Insur. Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991) (income excludable from income taxes under §104 also is excluded from FICA payroll taxes).

is "the expenditure side of the coin" and the RRTA "is the revenue side.").

In contrast, other courts have correctly concluded that time-lost payments are taxable compensation for the purposes of the RRTA notwithstanding their exclusion from gross income under 26 U.S.C. §104. *Phillips v. Chicago Cent. & Pac. R.R.*, 853 N.W.2d 636, 649 (Iowa 2014) (The RRA and RRTA are "inextricably interconnected because the latter funds the former" and it is "logical to read these two statutes in harmony to conclude that compensation as used in the RRTA implicitly includes time lost."); *Heckman v. Burlington N. Santa Fe Ry, Co.*, 837 N.W.2d 532, 540 (Neb. 2013); *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 29 (Pa. Super 2016) ("Although the *Mickey* Court attempted to disassociate the RRA and RRTA, we find the statutes are inextricably intertwined, and must be considered *in pari materia*. Indeed, without the benefits provided for in the RRA, there would be no need for the taxing provisions of the RRTA."); *Norfolk S. Ry. Co. v. Williams*, 2018 Ala. Civ. App. LEXIS 101 (Ala. Civ. App. 2018). These courts have focused on the relationship between the RRTA and RRA—and the connection between the taxes paid and benefits received—in concluding that time-lost payments must be treated similarly under both statutes.

D. Railroad Employees' RRA Benefits are Enhanced By Their Receipt of Pay for Time Lost and Therefore Railroad Retirement Taxes Must Be Paid on Time-Lost Awards.

The RRA, which is designed to provide specific benefits to a specific class of beneficiaries, cannot be considered as separate from and unconnected to the RRTA, the statute that levies the taxes which fund

those benefits. Rather, these statutes must be seen as inextricably interconnected, and payments that are compensation under one must also be treated as compensation under the other. As the Court explained in *Galveston By Bd. of Trustees v. United States,* 22 Cl. Ct. 600, 610 (Cl. Ct. 1991):

> The taxes on employees and carriers under RRTA . . . are earmarked to fund the retirement, . . . and disability benefits payable under the RRA . . . . The statutes that provide the benefits to railroad employees and the statutes that provide the supporting taxes are parts of the same legislative scheme. They are two sides of the same coin. Although the RRB administers the employee benefits system, and the IRS administers tax collections that support the system, the statutory scheme is highly integrated.

See also Standard Office Bldg. Corp., 819 F.2d at 1373 (The RRTA imposes "an employment or payroll tax on both employer and employee, with the proceeds used to pay pensions and other benefits."); *Florida E. Coast Ry. Co. v. United States,* 470 F.2d 513, 515 (Ct. Cl. 1972) ("The funding of [RRA] benefits . . . is provided by an employment tax levied equally on the railroad employers and their employees . . . ."). This close connection between the two statutes should inform this Court's analysis.

The definition of compensation under the RRA is highly relevant to the tax treatment of time-lost awards, far more relevant than how such awards are treated for income tax purposes, or how analogous payments are treated under FICA. The RRA's definition of "compensation" includes pay for "time lost," including pay for an "absence on account of personal

injury." 45 U.S.C. §231(h)(1) & (2). While the definition of compensation under the RRTA does not expressly refer to time-lost payments, 26 U.S.C. §3231(e)(1), the Treasury Department maintains the position that, as it does under the RRA, compensation under the RRTA includes "pay for time lost." 26 C.F.R. §31.3231(e)-1(a)(3)-(4). There is a sound reason for this.

Both eligibility for, and the level of, benefits payable to a retired railroad employee under the RRA are based on the employee's years of service and the amount of compensation with which the employee is credited. 20 C.F.R. §211.1; *Railroad Retirement Handbook* at 15 ("Benefits are based on earnings credits and months of service."). *See* 45 U.S.C. §231a(a)(1) (describing eligibility for both retirement and disability benefits); 45 U.S. C. §231a(b) (describing eligibility for supplemental retirement benefits). And "[a]ny month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service," 20 C.F.R. §210.5(d), and is considered "creditable compensation." 20 C.F.R. §211.3(a). Thus, for the purpose of calculating the benefits for which a railroad worker will become eligible, payment received for time lost (including pay received due to a personal injury) is included in determining both the employee's "years of service," 45 U.S.C. §231(f)(1), and "compensation." 45 U.S.C. §231(h)(1)&(2); 20 C.F.R. §211.2(b)(2).

As a result, when a FELA award for lost wages is made, and treated as a payment for time lost under the RRA, the employee realizes a distinct benefit because such treatment serves to increase the employee's years of service and compensation. *See* Pet. Br. at 11, 26 (Mr. Loos received credit for four months of service as a result of the time-lost payment received as

part of his FELA award). The rationale for this treatment is that but for the injury which caused the employee to miss work, he or she would have been working for the railroad and earning compensation. The RRB has explained that

> [t]he intent behind the pay for time lost concept is to treat an employee as if he or she had actually performed compensated services during an identifiable period of time. The effect of pay for time lost upon eligibility and benefits under the RRA [ ] is identical to the effect of regular earnings for which service and compensation credit are received.

Pay for Time Lost From Regular Railroad Employment at 1; *see Jacques v. R.R. Retirement Bd.*, 736 F.2d 34, 39-40 (2d Cir. 1984) (where the plaintiff's FELA complaint alleged loss of earnings due to the injury, the settlement award entered into was considered to be pay for time lost, resulting in the five months missed from work being counted as creditable compensation, thereby qualifying the plaintiff for a disability annuity under the RRA).

Because the employee receives RRA credit for the time lost, there is no rationale for permitting the employee to avoid the RRTA tax payment obligation. Had the employee-FELA claimant been working, he or she would have been paying railroad retirement taxes, which the railroad employer would deduct automatically from the employee's paycheck. As the court in *Liberatore* explained:

> [u]nder the RRA, a railroad employee receives an **increase** in benefits based upon his 'average monthly compensation.' That 'compensation' includes pay for time lost 'on

> account of personal injury.' Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under RRTA to pay those benefits.

140 A.3d at 29. (citations omitted) (emphasis in the original). *See also Williams*, 2018 Ala. Civ. App. 101, at *31 (agreeing with the rationale of *Liberatore*).

That is why the non-taxability of personal injury awards for income tax or FICA tax purposes has nothing to do with the tax treatment of those awards under the RRTA. A FELA award for time lost enhances a railroad worker's future railroad retirement benefits. In contrast, the receipt of a personal injury award neither confers an additional governmental benefit funded out of general funds nor enhances the plaintiff's Social Security benefits.

> [T]he SSA does not explicitly include an employee's pay for lost time due to personal injury when calculating benefits. Therefore, it follows that for purposes of collecting SSA taxes, FICA also does not tax an award for time lost due to personal injury.

Liberatore, 140 A. 3d at 30 (citation omitted).

Unpersuaded, the court below concluded that it "should not read the RRTA and the RRA *in pari materia* and that it is inappropriate to import the RRA's definition of 'compensation' into the RRTA." Pet App. 23a.[7] In discounting the close interconnection

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[7] Similarly, *Mickey* explained that the RRA's definition of compensation is irrelevant because "[t]he RRA and RRTA are separate statutes that are administered by separate agencies and serve different purposes," 437 S.W.3d at 214.

between the RRA and RRTA the Eighth Circuit noted that the "taxes paid by and on behalf of an employee [under the RRTA] do not necessarily correlate with the benefits to which the employee may be entitled under the RRA." Pet. App. 23a (quoting *Hisquardo v. Hisquardo,* 439 U.S. 572, 575 (1979) (internal quotation marks omitted)). That statement misses the larger point. While there is not necessarily a dollar-for-dollar correlation between the taxes paid and the benefits received, the taxes paid and hours of service credited directly enhance the benefits for which the employee ultimately will become eligible. *See Hance v. Norfolk S. Ry Co.,* 571 F.3d 511, 523 (6th Cir. 2009) (when the railroad pays tier I and tier II taxes on an employee's back pay award, the employee "will receive retirement credit for the time periods covered by the back pay award, putting him in the position he would have been in had he not been discharged."); *Norton v. R.R. Retirement Bd.,* 69 F.3d 282, 283 (8th Cir. 1995) ("'time lost' from active service counts toward an employee's total years of service if the employer compensates the employee for the time lost").

Recognizing the connection between the benefits and tax sides of the railroad retirement system, for more than a half-century the IRS has consistently maintained the position that the income tax treatment of personal injury awards under section 104 has no bearing on the RRTA tax treatment of pay for time lost. *See* IRS Rev. Rul. 61-1, 1961-1-C.B. 14, 1961 WL 12630 (1961) (ruling that payment received by a railroad employee under a settlement agreement for personal injuries was excluded from gross income for income tax purposes even though that same amount was taxable as pay for time lost under RRTA, explaining that tax treatment of a payment under the RRTA "is not controlling" for purposes of determining

the tax treatment for income tax purposes); IRS Rev. Rul. 85-97, 1985-2.C.B. 50, 1985 WL 287177 (1985) (reaffirming after the 1975 and 1983 RRTA amendments that a personal injury settlement was excludable from gross income, notwithstanding its treatment as taxable pay for time lost under the RRTA); *See also* IRS, Technical Advice Memorandum 8115012, 1980 WL 137627 (1980) ("payments are excludable from gross income under section 104(a)(2) of the Code, but constitute compensation for purposes of RRTA"); IRS, Technical Advice Memorandum 9322001, 1993 WL 187036 (1993) (explaining why removal of the specific reference to time lost from the RRTA's definition of compensation does not mean that time lost payments are excluded from taxable compensation under the RRTA); *See also* Pet Br. at 28-33 (explaining the purpose of the deletions of the references to time lost in the definition of compensation under the RRTA, and why those deletions did not change the meaning of compensation).

Some courts have reasoned that because wages (compensation) paid to an employee are a subset of gross income, if personal injury payments are excluded from gross income they necessarily cannot be considered compensation. *E.g., Cowden*, 2014 U.S. Dist. LEXIS 91454, at *26-27; *Mickey*, 437 S.W. 3d at 212. But the statute does not subscribe to that logic.

Personal injury damages is one of a number of items the Internal Revenue Code expressly excludes from gross income. The RRTA expressly incorporates some, *but not all*, of those exclusions from gross income into its definition of "compensation," meaning they are also

not considered RRTA compensation.[8] If all of the exclusions from gross income were necessarily excluded from compensation under the RRTA because compensation is a subset of gross income, there would be no reason to specifically reference those exclusions in the RRTA. That Congress did so confirms that it did not intend to automatically import all of the income tax code's exclusions from gross income wholesale into the RRTA. Indeed, while specifically incorporating many of the exclusions from gross income, the RRTA *does not* incorporate the exclusion of personal injury awards under §104(a)(2).

* * *

The purpose of the unified railroad retirement statutory scheme—to provide for and fund retirement and other benefits for railroad retirees—is undermined if the definitions of compensation under the RRA and RRTA are decoupled, or if the personal injury exclusion of 26 U.S.C. §104 is applied to RRTA taxes. Allowing railroad employees to receive credit for time-lost payments that can serve to enhance the benefits they will receive, or hasten their eligibility for those

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[8] *See, e.g.*, 26 U.S.C. §3231(e)(5), incorporating exclusions under 26 U.S.C. §74(c) (employee achievement awards), 26 U.S.C. §108(f)(4) (amounts received under federal or state student loan forgiveness programs), 26 U.S.C. 117 (qualified scholarships), and 26 U.S.C. §132 (fringe benefits); 26 U.S.C. §3231(e)(6), incorporating exclusion under 26 U.S.C. §127 (employer-provided educational assistance); 26 U.S.C. §3231(e)(9), incorporating exclusion under 26 U.S.C. §119 (value of meals and lodging furnished by employer); 26 U.S.C. §3231(e)(10), incorporating exclusion under 26 U.S.C. §106(b) (medical savings account contributions); 26 U.S.C. §3231(e)(11), incorporating exclusion under 26 U.S.C. §106(d) (employer contributions to health savings accounts); 26 U.S.C. §3231(e)(12), incorporating exclusions under 26 U.S.C. §422(b) and §423(b) (qualified stock options).

benefits, while exempting those payments from the very taxes which fund those benefits, is bad policy as it undermines Congress' carefully calibrated balance between benefits and funding. Ultimately, such a result would mean additional funding will be required to keep the systems in financial balance. Absent some clear indication from Congress that it intended that there be a lack of balance between the calculation of benefits on the one hand and the funding of those benefits on the other, the statutes should not be read to create such an imbalance.

CONCLUSION

For the foregoing reasons the ruling below should be reversed.

Respectfully submitted,

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No. 17-1042

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of *Amici Curiae* SMART (The International Association of Sheet Metal, Air, Rail, and Transportation Workers) and ARLA (The Academy of Rail Labor Attorneys) Supporting Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTERESTS OF *AMICI CURIAE* SMART (THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS) AND ARLA (THE ACADEMY OF RAIL LABOR ATTORNEYS) 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Supposed Unfairness of the Status Quo ... 3

II. The Railroads' True Motive 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Anderson v. BNSF Ry.,
380 Mont. 319 (2015) 6

Eichel v. New York Cent. R. Co.,
375 U.S. 253 (1963) 6, 7

Hetrick v. Reading Co.,
39 F. Supp. 22 (D.N.J. 1941) 6

Hisquierdo v. Hisquierdo,
439 U.S. 572 (1979) 6

New York, N.H. & H.R. Co. v. Leary,
204 F.2d 461 (1st Cir. 1953) 7

United States v. Price,
288 F.2d 448 (4th Cir. 1961) 7

STATUTES

45 U.S.C. § 231a 3, 4

45 U.S.C. § 231(f)(1) 3

RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Report of Majority Staff of the Committee on Transportation and Infrastructure Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007) 6

U.S. Railroad Retirement Bd., *2018 Annual Report* 2, https://rrb.gov/sites/ default/files/2018-08/2018_Annual_Report.pdf 3

Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2 (2008) 3

STATEMENT OF INTERESTS OF *AMICI CURIAE* SMART (THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS) AND ARLA (THE ACADEMY OF RAIL LABOR ATTORNEYS)[1]

SMART, the International Association of Sheet Metal, Air, Rail and Transportation Workers, is the certified labor representative for more than 216,000 employees. Among those whom it represents are conductors, engineers, train service employees and other rail employees employed by the nation's rail carriers. SMART is actively engaged in legislative efforts and litigation affecting the rights of its members and public safety, and it has a substantial interest in this case because its members are subject to taxes under the Railroad Retirement Tax Act.

ARLA, the Academy of Rail Labor Attorneys, is a professional association of plaintiffs' attorneys whose practice includes the representation of injured railroad workers and their families under the Federal Employers' Liability Act. ARLA is actively engaged in legislative efforts and litigation affecting the rights of the clients its members represent, and it has a substantial interest in this case because those clients obtain FELA verdicts against Petitioner and the other railroads.

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[1] Both parties have consented to ARLA and SMART filing an *amicus* brief. Pursuant to Rule 37.6, ARLA and SMART state that no person or entity other than ARLA and SMART have made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF ARGUMENT

After eighty years of the Federal Employers Liability Act ("FELA") and Railroad Retirement Tax Act ("RRTA") coexisting, Petitioner and its *amici* raise a novel argument: that wage loss awards in cases brought under the FELA are taxable. Adoption of this novel position would result in an increase to the tax liabilities of Petitioner and the other members of its *amicus*, the American Association of Railroads ("AAR"). This raises the question: Why are the railroads arguing to pay more in taxes?

While the railroads would have the Court believe that they want nothing more than to ensure parity between benefits received under the Railroad Retirement Act ("RRA") and taxes paid under the RRTA, even a cursory review of the railroads' argument demonstrates that not only are they addressing a problem that does not exist but also that their proposed "solution" creates the very inequities it is supposed to cure.

The railroads' true motivation for arguing to end an enduring status quo is that they have realized that taxing FELA verdicts will penalize plaintiffs who proceed to trial, thereby allowing them to coerce injured workers to settle their FELA cases for less money. In other words, the railroads' novel argument is just another part of its agenda of attacking the FELA. The Court should decline to adopt the novel argument and create new inequities just so that the railroads can pay workers less than what they are owed for their injuries.

ARGUMENT

I. The Supposed Unfairness of the Status Quo

The AAR argues that injured workers are receiving benefits without paying for them, which it says is unfair and necessitates the Court finding that FELA wage loss awards are taxable. This argument is not only irrelevant but also untrue. Indeed, adoption of the railroads' position would result in the inequities against which they argue.

Through the RRA, Congress established a federal pension system for retired and disabled railroad workers. *See, e.g.*, Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008). Like social security, the amount in taxes paid may be asymmetric to the amount in benefits received, with some workers receiving more benefits than their former coworkers, others receiving less, and still others receiving no benefits at all. *See, e.g.*, 45 U.S.C. §§ 231a, 231(f)(1) (demonstrating that the benefits have different eligibility requirements, such as different required minimum years of service, and that coworkers can receive different benefits because the benefits are based on "years of service" and levels of compensation, and the benefits may be accelerated due to disability).

Injured workers possibly receiving more benefits is consistent with the RRA's purpose. Moreover, consider that any supposed imparity has not caused the RRA to be underfunded. *See, e.g.*, U.S. Railroad Retirement Bd., *2018 Annual Report* 2, https://rrb.gov/sites/default/files/2018-08/2018_Annual_Report.pdf ("[T]he

railroad retirement system will experience no cash-flow problems during the next 29 years.")

Plus, it has been the experience of the amici submitting this brief that if an injured worker obtains a verdict and wants service credit, the railroads take the position that the credit can only be obtained through settlement, which the railroads use to coerce the employee to accept an amount that is less than what the jury awarded.

Adoption of the railroads' position, on the other hand, would result in a disparity between benefits received under the RRA and taxes paid under the RRTA, with injured workers paying for benefits they will not receive. For example, when a railroad's negligence kills a worker, whatever amount the jury awards his or her family for wage loss will be taxed even though the family may or may not receive any survivor benefits and whatever survivor benefits they do receive are less than what the employee would have received had he or she not been killed. *See, e.g.*, 45 U.S.C. § 231a. As another example, railroad employees' RRA benefits do not vest unless and until they have five years of service credit, which means injured workers who have less than five years of service credit would pay taxes for benefits they will not receive. *Id.* As a final example, workers who are sixty years of age and have thirty years of service credit can retire with "full benefits," which means their verdicts will be taxed even though they will not receive any more benefits than those to which they were already entitled. *Id.*

Contrary to what the AAR argues, injured workers are not receiving benefits without paying for them. Adoption of the railroads' position, however, would

result in the opposite happening. And either way, any disparity between taxes paid and benefits received is irrelevant to whether FELA wage loss awards should be taxed.

II. The Railroads' True Motive

The railroads cannot cite to a single instance in which the IRS has sought to tax a FELA wage loss award. At the same time, the railroads are arguing for a result that would increase their tax liability, *e.g.*, in this case, the Petitioner asks that the Court find not only that Respondent owes $3,765 in taxes but also that it owes an additional $6,234 to the IRS. (Pet.App. 21a-23a, 29a.) This raises a question: What is motivating the railroads to argue that they should be forced to pay more in taxes?

If the Court finds that FELA wage loss awards are taxable, it will be creating a "trial penalty." Specifically, the railroads will be able to tell injured workers that a verdict will result in the jury attributing a substantial portion of the award to wage loss, which will be taxed, and that they are therefore better off taking a settlement, in which the parties can attribute money away from wage loss.

Thus, this case is not about railroads genuinely believing, after nearly eighty years, that FELA wage loss awards have suddenly become taxable; rather, the railroads have discovered that although taxing FELA wage loss awards will increase their tax liability, those amounts will be more than offset by the amounts they will be able to save by coercing injured workers to accept lower (and possibly inadequate) settlement offers.

This case is just the latest step in Petitioner's and the railroads' attack on the FELA. For example, Petitioner and the other railroads have a long history of trying to minimize the amounts they pay to their workers for their injuries by discouraging them from reporting them in the first place, blaming them for whatever injuries they do report, and manufacturing pre-textual reasons to terminate those who they cannot blame. *See, e.g.*, *Report of Majority Staff of the Committee on Transportation and Infrastructure Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure*, 110th Cong. (Oct. 22, 2007) (Administrator of the Federal Railroad Administration testifying that "[t]he underlying motivators driving harassment and intimidation [of injured workers] are varied and powerful, and deeply engrained in railroad culture"). As another example, when trying to coerce a worker who wants service credit to accept a settlement offer for less money than what a jury has or would award him or her, the railroads take the position that service credits can only be obtained through settlement, which is contrary to the position it has taken in this case. *Supra* at 4. For a third example, courts have found that Petitioner has been defending itself in FELA cases by engaging in "a pattern of practice that relies on misconduct to prevail in court." *Anderson v. BNSF Ry.*, 380 Mont. 319, 348-50 (2015). For a final example, although courts have rejected their attempts, the railroads have argued that the amounts they pay for FELA awards should be offset by RRA benefits. *See, e.g.*, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588 n.22 (1979) (citing *Hetrick v. Reading Co.*, 39 F. Supp. 22 (D.N.J. 1941); *Eichel v. New York Cent. R.*

Co., 375 U.S. 253, 254 (1963) (per curiam); *United States v. Price*, 288 F.2d 448, 451 (4th Cir. 1961); *New York, N.H. & H.R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953).

Petitioner's history of trying to minimize the amounts it pays to injured workers clarifies why it has taken the counterintuitive position it has taken here. After more than eighty years of the FELA and RRTA having coexisted, Petitioner suddenly believes that FELA wage loss awards should be taxed because it sees an opportunity to further reduce the compensation it must pay to injured workers.

CONCLUSION

The railroads have put forth a novel position because they have realized that adoption of it would create a "trial penalty," which they can use to decrease the amounts they pay to workers to compensate them for their injuries. This is underscored not only by the railroads' history of attacking the FELA but also the disingenuousness of its equity-based argument. The Court should decline to assist the railroads in its efforts to minimize the amounts they pay to injured workers.

Respectfully submitted,

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